

7821

RECEIVED

JAN 13 1984

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 35, Original

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF MAINE, et al (RHODE ISLAND, NEW YORK),

Defendants.

REPORT OF THE SPECIAL MASTER

68 +

8 folders

WALTER E. HOFFMAN
Special Master
425 U. S. Courthouse
Norfolk, Virginia 23510

BEST AVAILABLE COPY

TABLE OF CONTENTS

	<i>Page</i>
I. INTRODUCTION	1
II. CONVENTION ON THE TERRITORIAL SEA AND CONTIGUOUS ZONE	5
III. POSITIONS OF THE PARTIES	7
IV. HISTORIC BAY DISCUSSION	8
A. Disclaimer of Historic Title by the United States.....	11
B. Evidence of a Historic Claim	12
1. Regulation of Fishing	12
2. Pilotage Statutes	15
3. Rhode Island — New York Boundary Agreement	17
V. JURIDICAL BAY DISCUSSION	20
A. Article 7.....	20
B. Theories of the Parties	21
C. Indentation	24
1. Long Island as an Island.....	25
2. Long Island as an Extension of the Mainland	28
D. Whether Long Island is an Extension of the Mainland	30

1. Whether Islands Can Be Treated as Part of the Mainland	30
2. Whether Long Island Can Be Considered a Part of the Mainland	37
E. Semi-Circle Test	47
F. Closing Line of the Bay	49
VI. CONCLUSION	60
VII. RECOMMENDATIONS	62

TABLE OF AUTHORITIES

CASES

	<i>Page</i>
<i>United States v. Alaska</i> , 422 U.S. 184 (1975)	8,9,10 12,13,14
<i>United States v. California</i> , 382 U.S. 448 (1966).....	3,51
<i>United States v. California</i> , 381 U.S. 139 (1965).....	3,5,6,7 10,19,30,43
<i>United States v. Louisiana</i> , 394 U.S. 11 (1969)	3,5,7,8 9,10,15,16,24,25,31,32,33,34 35,36,37,38,39,40,41,53,54,56
<i>Warner v. Replinger</i> , 397 F.Supp. 350 (D.R.I. 1975), aff'd. sub nom., <i>Warner v. Dunlap</i> , 532 F.2d 767 (1st Cir. 1976), petition for cert. filed sub nom. <i>Ball v. Dunlap</i> , Docket No. 75-6990.....	1,2,22,23,39

SPECIAL MASTER REPORTS

Special Master Report, <i>United States v. Louisiana</i> , No. 9, Original, July 31, 1974	11,32,33
--	----------

STATUTES, RESOLUTIONS OF CONGRESS, AND TREATIES

	<i>Page</i>
Convention on the Territorial Sea and Contiguous Zone, April 29, 1958, 15 U.S.T. 1607, T.I.A.S. 5639	5, and passim
Article 3	5,7,24
Article 4	6,7,39
Article 5	6
Article 7	6,7,8,20 21,22,23,24,25,28,29,33,38,46 47,49,53,54,55,56,60,61
Article 8	58
Article 10	6,7,24
Article 13	6
H.R.J. Res. 138, 58 Stat. 672 (1944)	17,18
N.Y. Eenvt. Conserv. Law § 13-0329	12
R.I. Gen. Laws § 46-9.1-1 <i>et seq.</i>	15
Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315	3
46 U.S.C. § 211	2

OTHER AUTHORITIES

	<i>Page</i>
P. Beasley, <i>Maritime Limits and Baselines: A Guide to Their Delineation</i> , Special Publication No. 2 (rev. 2d ed. 1978)	22,45,46 51,52
Black's Law Dictionary (5th ed. 1979)	40,44
Final Draft Act of the Third United Nations Conference on the Law of the Sea, Oct. 7, 1982, U.N. Doc. A/CONF.62/122	20
R. Hodgson and L. Alexander, <i>Towards an Objective Analysis of Special Circumstances</i> , Occasional Paper No. 13	50,51,52,54
Report of the International Law Commission to the General Assembly, U.N. Doc. A/2934 (1955), reprinted in, [1955] 2 Y.B. Int'l Law Comm'n 37, U.N. Doc. A/CN.4/SER.A/1955/Add.1	33,34
I A. Shalowitz, <i>Shore and Sea Boundaries</i> (1962).....	36,50,56,57
M. Strohl, <i>The International Law of Bays</i> (1963)....	36,50,52,53

APPENDICES

APPENDIX A - Stipulation of the Parties

**APPENDIX B - Chart 12300, Approaches to
New York**

**APPENDIX C - Chart 13205, Block Island Sound
with proposed closing lines indicated**

**APPENDIX D - Map of Boundary Line between
the States of New York and Rhode Island**

**APPENDIX E - Chart 11356, Isles Derniers to Point
Au Fer (Caillou Bay)**

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 35, Original

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF MAINE, et al (RHODE ISLAND, NEW YORK),

Defendants.

REPORT OF THE SPECIAL MASTER

I. INTRODUCTION

The issue to be decided in this Supreme Court original jurisdiction proceeding is the location of the legal coastline of the United States in the area of the eastern end of Long Island Sound and Block Island Sound. The resolution of this issue turns specifically on whether Long Island Sound and Block Island Sound comprise a bay under the terms of the Convention on the Territorial Sea and Contiguous Zone.

In *Warner v. Replinger*, 397 F.Supp. 350 (D.R.I. 1975), the plaintiffs, pilots of foreign flag and American registry vessels who were licensed by Connecticut, challenged a Rhode Island statute which requires every foreign vessel and every American vessel under register for foreign trade that traverses Block Island Sound to take on a pilot licensed by the

Rhode Island Pilotage Commission. The District Court in that case concluded that the issue to be decided was whether the Rhode Island statute was authorized by 46 U.S.C. § 211, which authorizes states to regulate the use of pilots "in bays, inlets, rivers, harbors, and ports of the United States. . . ." 397 F.Supp. at 351, 359. Resolution of the issue, according to the District Court, turned on whether Block Island Sound was a bay, inlet, river, harbor, or port as contemplated by the federal statute. *Id.* The District Court looked to the Convention on the Territorial Sea and Contiguous Zone, 15 U.S.T. 1607, T.I.A.S. 5639, for a definition of what constitutes a bay, found Long Island Sound and Block Island Sound to be a bay, and consequently upheld the Rhode Island statute. 397 F.Supp. at 353-56. The First Circuit affirmed the decision of the District Court finding the waters of Long Island Sound and Block Island Sound to be a bay. *Warner v. Dunlap*, 532 F.2d 767 (1st Cir. 1976). On June 26, 1976, a petition for a writ of certiorari was filed with the Supreme Court. *Ball v. Dunlap*, Docket No. 75-6990.¹

In December, 1976, apparently in response to the litigation concerning the Rhode Island pilotage statute, the United States filed a Motion for Supplemental Proceedings in this case, *United States v. Maine, et al.*, No. 35 Original, to determine the coastline of Rhode Island. On June 29, 1977, the undersigned was appointed to serve as Special Master in this proceeding. 433 U.S. 917 (1977).²

Rhode Island was the only state designated as a defendant by the United States in its complaint to determine the coast-

¹ The petition for a writ of certiorari is still pending before the Supreme Court.

² In January, 1977, the United States and the Commonwealth of Massachusetts moved jointly for supplemental proceedings in *United States v. Maine, et al.*, to resolve a controversy regarding the coastline of Massachusetts. The June 29, 1977, order of reference of the Supreme Court referred both disputes to the undersigned. The Rhode Island proceedings were separated from the Massachusetts proceedings when it became clear that the two disputes involved different issues.

line of Rhode Island. On October 20, 1978, the Special Master, acting *sua sponte*, advised the Attorneys General of the states that were the named parties in *United States v. Maine, et al.*, of the pendency of these supplemental proceedings and their potential interest therein. On November 14, 1978, New York responded expressing a "possible interest" in the proceedings and reserving their right to be active in the proceedings at some later time. In September, 1981, after the United States and Rhode Island had completed discovery, New York filed a Motion to Intervene in these proceedings. On October 8, 1981, the Special Master determined that New York was already a party to this action and granted New York leave to participate.³

After the parties submitted pretrial briefs setting forth their contentions, evidentiary hearings were held on November 9 through 13, 1981, in Providence, Rhode Island, and on January 12 and 13, 1982, in Norfolk, Virginia. Subsequent to the evidentiary hearings the parties submitted simultaneous post-trial briefs and post-trial reply briefs. Oral argument was heard on May 14, 1982, in Norfolk, Virginia, after which the parties submitted short post-oral argument memoranda.

The basic issue to be determined in this proceeding is the location of the legal coastline of the United States, the State of Rhode Island and the State of New York in the area of the eastern end of Long Island Sound and essentially all of Block Island Sound. The legal coastline, also called the baseline, is the point from which the territorial sea and a state's jurisdiction under the Submerged Lands Act, 43 U.S.C. §§ 1301-1315, is measured, and marks the seaward limit of a state's internal waters separating these waters from the territorial sea. See *United States v. Louisiana*, 394 U.S. 11, 22-23 (1969); *United States v. California*, 381 U.S. 139 (1965). See also *United States v. California*, 382 U.S. 448, 450 (1966).

³ New York agreed that it was not necessary to conduct further discovery before the case could proceed.

Rhode Island and New York assert that the waters of Long Island Sound and Block Island Sound landward of baselines (or closing lines), connecting Montauk Point on Long Island with Block Island and Block Island with Point Judith, Rhode Island, comprise a bay and are thus internal state waters.⁴ The United States asserts that the waters of Block Island Sound are not part of a bay but instead are territorial waters and high seas, and that the legal coastline is the ordinary low water line along the mainland and around Block Island.⁵

If Block Island Sound and Long Island Sound are a bay as asserted by Rhode Island and New York, Block Island Sound would be internal state waters and the legal coastline would be drawn in accordance with the submission of the states. If Block Island Sound, however, is not part of a bay, the waters of Block Island Sound would be territorial waters and high seas and the legal coastline would be drawn essentially in accordance with the submission of the United States. Thus,

⁴ Rhode Island asserts in its Answer and Counterclaim that the coastline for Rhode Island is:

the ordinary low water line along the mainland beginning at the Massachusetts border to a point off Sakonnet Point, then a straight closing line from Sakonnet Point west to Point Judith, then a straight closing line south to Sandy Point on Block Island, then the ordinary low water line along the Block Island shore clockwise, to a point along a straight closing line to Montauk Point on Long Island, State of New York

⁵ The United States submits in its Second Amended Complaint that:

The coastline of Rhode Island is the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters.

. . . .

[T]he coast of the State of Rhode Island, except as to Block Island, is the ordinary low water line along the mainland beginning at the Massachusetts border to a point off Sakonnet Point, then a straight closing line across Narragansett Bay to Point Judith, then the ordinary low water line along the mainland to the Connecticut border. As to Block Island, the coast of the State of Rhode Island is the ordinary low water line around Block Island. . . .

the resolution of this issue turns specifically on whether the waters of Long Island Sound and Block Island Sound comprise a bay.

II. CONVENTION ON THE TERRITORIAL SEA AND CONTIGUOUS ZONE

The Supreme Court has directed, and the parties to this proceeding agree, that the courts will use the Convention on the Territorial Sea and Contiguous Zone, April 29, 1958, 15 U.S.T. 1607, T.I.A.S. 5639 [hereinafter the Convention], to define inland or internal waters. *United States v. Louisiana*, 394 U.S. 11, 17-35 (1969); *United States v. California*, 381 U.S. 139, 161-67 (1965). In both *United States v. California*, 381 U.S. at 163-65, and *United States v. Louisiana*, 394 U.S. at 21, the Supreme Court recognized that the Convention provides "the best and most workable definitions available" for defining inland waters, such as bays. These decisions also indicate that the Convention should be used for all purposes where it is necessary to define inland waters and the legal coastline, so the United States will have a single coastline established for domestic purposes and international relations. *United States v. Louisiana*, 394 U.S. at 34-35; *United States v. California*, 381 U.S. at 165. Thus, in this proceeding, the Convention will be applied to resolve the issues.

The Convention sets forth the following Articles with respect to the location of the coastline, which is referred to as the baseline in the Convention.

Article 3

Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

Article 13

If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-tide of its banks.

Article 5

1. Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

In regard to islands, Article 10 of the Convention provides:

Article 10

1. An island is a naturally formed area of land, surrounded by water, which is above water at high-tide.

2. The territorial sea of an island is measured in accordance with the provisions of these articles.

Other Articles of the Convention provide guidelines for determining the baseline for unique geographic coastal formations. First, Article 7 establishes criteria for drawing the baseline of "bays." Article 7(1) states that the Article applies "only to bays the coasts of which belong to a single State." Articles 7(2) through 7(5) set forth criteria for determining what constitutes a "juridical bay" and for positioning the baseline of such a bay. Second, Article 7(6) states that the criteria needed for a juridical bay do not apply to "historic" bays, thus recognizing that a historic claim may qualify a body of water as a bay and internal waters. Lastly, Article 4 allows coastal States to draw "straight baselines" to enclose coastal water formations, where a coast is deeply indented and cut into, and where there is a fringe of islands along the coast. The Supreme Court, however, has stated that the decision to use Article 4 "rests with the Federal Government, and not with the individual States." *United States v. California*,

381 U.S. at 168; *United States v. Louisiana*, 394 U.S. at 72. Thus far, the Federal Government has not elected to apply the straight baseline system to the coasts of the United States. Accordingly, the straight baseline system of Article 4 is not applicable in this proceeding.

III. POSITIONS OF THE PARTIES

The United States relies on Article 3 and Article 10(2) of the Convention to support their position in this proceeding. The United States contends that the normal baseline rule of Article 3 should be employed to draw the baseline of Block Island Sound along the mainland from Point Judith to the Connecticut border. With respect to Block Island and Long Island the Government claims that Article 10(2) applies and the baseline is the low water line around the islands. The United States admits that the waters of Long Island Sound are historic internal waters and asserts that they should be closed by baselines across the Race entrance at the eastern end of Long Island Sound, from Orient Point on Long Island to Plum Island, from Plum Island to Race Point on Fishers Island, and from Fishers Island to Napatree Point, Rhode Island.⁶

Rhode Island and New York rely solely on Article 7 of the Convention for a determination in this proceeding of whether the waters of Block Island Sound are internal state waters. Based on Article 7 the States take two separate and distinct approaches to the issue. One approach is based on the savings clause of Article 7(6) and involves a claim by the States that Block Island Sound, or at least part of it, constitutes historic internal waters. The other approach is based on the juridical bay test of Articles 7(2) through 7(5).

⁶ See U.S. Post-Trial Opening Brief at 11-12, 30, 36; Dolan, Nov. 9, 1981, at 45-46, 53-54, 59. See also Appendix C.

It is clear from the Convention that a body of water can be a historical bay without conforming to the geographic tests required for a juridical bay. See *United States v. Louisiana*, 394 U.S. at 75 n.100. Consequently, if Block Island Sound is entitled to historic bay status the waters of Block Island Sound are internal state waters and it would then not be necessary to determine whether the Sound is a juridical bay. Accordingly, the historic bay claim will be examined first.

IV. HISTORIC BAY DISCUSSION

The States claim that Block Island Sound is historic internal waters based on Article 7(6) of the Convention, which provides:

The foregoing provisions shall not apply to so-called "historic" bays, or in any case where the straight baseline system provided for in article 4 is applied.

In *United States v. Alaska*, 422 U.S. 184 (1975), the Supreme Court elaborated on what was needed to establish a historic claim. The Court stated:

The term "historic bay" is not defined in the Convention. The Court, however, has stated that in order to establish that a body of water is a historic bay, a coastal nation must have "traditionally asserted and maintained dominion with the acquiescence of foreign nations." *United States v. California*, 381 U.S. at 172. Furthermore, the Court appears to have accepted the general view that at least three factors are significant in the determination of historic bay status: (1) the claiming nation must have exercised authority over the area; (2) that exercise must have been continuous; and (3) foreign states must have acquiesced in the exercise of authority. *Louisiana Boundary Case*, 394 U.S., at 75 and 23-24, n. 27.

422 U.S. at 189.

The Court went on to explain, with regard to the first factor, that to establish a historic claim the exercise of authority must be of a particular kind of authority. That is "the exercise of sovereignty must have been, historically an assertion of power to exclude all foreign vessels and navigation." *Id.* at 197. The Court has also pointed out that the authority exercised must be commensurate in scope with the nature of the title claimed. *Id.* See also *United States v. Louisiana*, 394 U.S. at 24-26.⁷

The second factor will be satisfied if the exercise of authority continued for a considerable time, such that it developed into a usage. See *United States v. Louisiana*, 394 U.S. at 23-24 n.27.

With regard to the third factor, acquiescence by foreign nations, the Supreme Court stated:

Scholarly comment is divided over whether the mere absence of opposition suffices to establish title. See *Juridical Regime of Historic Waters, Including Historic Bays*, 2 Yearbook of the International Law Commission, 1962, pp. 1, 16-19 (U.N. Doc. A/CN.4/143). The Court previously has noted this division but has taken no position in the debate. See *Louisiana Boundary Case*, 394 U.S., at 23-24, n. 27. In this case, we feel that something more than the mere failure to object must be shown. The failure of other countries to protest is meaningless unless it is shown that the governments of those countries knew or

⁷ In *United States v. Louisiana*, the Court stated:

Historic title can be obtained over territorial as well as inland waters, depending on the kind of jurisdiction exercised over the area. "If the claimant State exercised sovereignty as over internal waters, the area claimed would be internal waters, and if the sovereignty exercised was sovereignty as over the territorial sea the area would be territorial sea." *Juridical Regime of Historic Waters, Including Historic Bays*, [2 Y.B. Int'l Law Comm'n [23 [U.N. Doc. A/CN.4/143 (1962)]].

reasonably should have known of the authority being asserted.

United States v. Alaska, 422 U.S. at 200.

From the above analysis, it is clear that there are three criteria that must be met to establish a historic claim to a body of water. First, the claiming nation or state must have exercised sovereign authority over the area with respect to its local citizens and foreign nations. Second, the exercise of authority must have been continuous over a period of time. Last, the governments of the foreign nations must have known of the authority being asserted and acquiesced in the exercise of authority or reasonably should have known of the exercise of authority.

In *United States v. California*, the Supreme Court stated the following with regard to establishing a historic claim:

The United States disclaims that any of the disputed areas are historic inland waters. We are reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was *clear beyond doubt*. But in the case before us, with its questionable evidence of continuous and exclusive assertions of dominion over the disputed waters, we think the disclaimer decisive.

381 U.S. at 175 (emphasis added). In *United States v. Louisiana*, the Court adopted this language and continued:

Thus, the Court indicated its unwillingness to give the United States the same complete discretion to block a claim of historic inland waters as it possesses to decline to draw straight baselines.

While we do not now decide that Louisiana's evidence of historic waters is "clear beyond doubt," neither are we in a position to say that it is so "questionable" that the United States' disclaimer is con-

clusive. We do decide, however, that the Special Master should consider state exercises of dominion as relevant to the existence of historic title.

394 U.S. at 77.

Thus, the initial inquiry in the historic bay analysis is to determine whether the United States has disclaimed any intention on its part to establish Block Island Sound as historic inland waters. If such a disclaimer is found, then the States must present evidence supporting their claim that Block Island Sound is historic inland waters, which is "clear beyond doubt." See Report of the Special Master, *United States v. Louisiana*, No. 9, Original, 13-22, July 31, 1974.

A. DISCLAIMER OF HISTORIC TITLE BY THE UNITED STATES

In 1971, the United States published a series of charts of the United States coastline delimiting the baseline and the territorial seas. Through these charts, the United States furnishes to foreign nations their position with respect to delimitation of the coastline of the United States. These charts included one which covered the entire Long Island Sound and Block Island Sound Area. See Appendix C.⁸ Upon examination of this chart, it is apparent that the position of the Government in 1971 is identical to the position of the Government in this proceeding.

The Special Master determines, that the United States has sufficiently disclaimed any historic title to, or sovereign jurisdiction over, the entire Block Island Sound area. Accordingly, the burden is on the States to prove by evidence that is "clear beyond doubt" that Block Island Sound is historic internal waters and overrides the federal disclaimer of historic title.

⁸ Hugh Dolan testified that U.S. Ex. M-2 (Chart 13205), a copy of which is reproduced in Appendix C, is an accurate reproduction of the original nautical chart C&GS 1211, 15th ed., Aug. 2, 1969, that had the baseline claimed by the United States delimited on it. Dolan, Nov. 9, 1981, at 43-45.

B. EVIDENCE OF A HISTORIC CLAIM

1. Regulation of Fishing

The evidence that Rhode Island and New York rely on to support their historic claim can be grouped into three categories. The first category of evidence relates to the enforcement of New York Marine Fishery laws. Arthur Christ, a supervisor with the New York State Environmental Conservation Department, testified that he supervised the enforcement of New York's Fishery Laws in the portion of Block Island Sound that was within the jurisdiction of New York from 1948 to 1976 when he retired. Christ, Jan. 25, 1982, at 1,6 (Deposition). Christ testified that he was primarily concerned with enforcing the laws that related to lobsters. *Id.* at 14, 21-22,29. See, e.g., N.Y. Env'tl. Conserv. Law § 13-0329. These laws applied to both residents and non-residents of New York, although there was a restricted area where non-residents could not take lobsters. *Id.* at 6,21. When the lobster laws were violated, such as by taking lobsters without a permit, the person would be apprehended and taken before a New York official on Fishers Island. *Id.* at 14. Christ also testified that patrols in the sound were not on any specific schedule, but were more or less at random, unless there had been complaints in an area in which case the patrols would be continuous. *Id.* at 16-17.⁹ New York argues that its regulation of fishing in Block Island Sound supports a historic claim to the Sound.

In *United States v. Alaska*, the Supreme Court addressed whether fishing regulations can establish historic title to a body of water. The Court stated:

Only one of the fishing regulations relied upon by [Alaska], the Alien Fishing Act, treated foreign ves-

⁹ Jean Gottman also testified that commercial fishing, and "sport" boating and fishing activities are present in Block Island Sound. Gottman, Jan. 12, 1982, at 50, 91. New York asserts that this evidence demonstrates its past and present interest in Block Island Sound and supports a historic claim. The Special Master concludes that this type of evidence does not support a claim of historic inland waters.

sels differently than it did American vessels. That Act, however, did not purport to apply beyond the three-mile limit in Cook Inlet. . . . The remainder of the fish and wildlife regulations . . . clearly were enforced throughout lower Cook Inlet for at least much of the territorial period, but these regulations were not commensurate in scope with the claim of exclusive dominion essential to historic title over inland waters. Each afforded foreign vessels the same rights as were enjoyed by American ships. To be sure, there were instances of enforcement in the lower inlet, but in each case the vessels involved were American. These incidents prove very little, for the United States can and does enforce fish and wildlife regulations against its own nationals, even on the high seas. . . .

Our conclusion that the fact of enforcement of game and fish regulations in Cook Inlet is inadequate, as a matter of law, to establish historic title to the inlet as inland waters is not based on mere technicality. The assertion of national jurisdiction over coastal waters for purposes of fisheries management frequently differs in geographic extent from the boundaries claimed as inland or even territorial waters. . . . This limited circumscription of the traditional freedom of fishing on the high seas is based, in part, on a recognition of the special interest that a coastal state has in the preservation of the living resources in the high seas adjacent to its territorial sea.

Id. at 197-99. The Court concluded, thus, that fishing regulations that do not discriminate between foreign and domestic vessels, are not, as a matter of law, an exercise of the type of authority that is needed to establish a historic claim. The Court went on to dismiss all the fishing regulations, including the Alien Fishing Act which discriminated against foreign vessels, as establishing a historic claim under the

third factor; acquiescence by foreign nations. The Court stated:

[W]e still . . . disagree with the District Court's conclusion that historic title was established in the territorial period. The court found that the third essential element of historic title, acquiescence by foreign nations, was satisfied by the failure of any foreign nation to protest. . . . In this case, we feel that something more than the mere failure to object must be shown. The failure of other countries to protest is meaningless unless it is shown that the governments of those countries knew or reasonably should have known of the authority being asserted. . . . We believe that the routine enforcement of domestic game and fish regulations in Cook Inlet in the territorial period failed to inform foreign governments of any claim of dominion. In the absence of any awareness on the part of foreign governments of a claimed territorial sovereignty over lower Cook Inlet, the failure of those governments to protest is inadequate proof of the acquiescence essential to historic title.

Id. at 199-200.

Based upon the analysis of the Supreme Court in *United States v. Alaska*, the Special Master concludes with respect to the fishing regulations which treat residents and non-residents alike, since they afford foreign nationals the same rights as are enjoyed by Americans, that their enforcement fails to establish the States' historic claim as a matter of law. With respect to the regulations which discriminate between Americans and foreign nationals, the Special Master concludes that the evidence of enforcement fails to establish acquiescence by foreign states and thus does not support any historic claim. The evidence did not include a single incident involving a foreign vessel and thus there is no evidence that any foreign government was ever informed of the States' claim of dominion.

2. Pilotage Statutes

The second category of evidence concerns the regulation of navigation. Both Rhode Island and New York have laws that require ships transiting Block Island Sound to take on a state licensed pilot. The New York statute, N.Y.Nav.Law § 89-b, requires every foreign and American vessel transiting the New York water of Long Island Sound and Block Island Sound to take on a pilot licensed under the laws of New York or the laws of a state with concurrent jurisdiction. Violators of the statute must pay the pilotage as if a pilot had been employed and a violation is a misdemeanor punishable by a fine or imprisonment. The Rhode Island pilotage statute, R.I.Gen. Laws § 46-9.1-1, *et seq.*, is similar to the New York statute in that it requires every foreign vessel and American vessel transversing Block Island Sound to take on a pilot licensed under Rhode Island authority and violators of the statute must pay the pilotage fee and are subject to misdemeanor penalties.

The States argue that the pilotage statutes serve as clear evidence of an assertion of jurisdiction against foreign nations.

In *United States v. Louisiana*, the Supreme Court addressed whether regulation of navigation can give rise to a historic claim. The Court stated:

[I]t is universally agreed that the reasonable regulation of navigation is not alone a sufficient exercise of dominion to constitute a claim to historic inland waters. On the contrary, control of navigation has long been recognized as an incident of the coastal nation's jurisdiction over the territorial sea. Article 17 of the Convention on the Territorial Sea and the Contiguous Zone embodies this principle in its declaration that "[f]oreign ships exercising the right of innocent passage [in the territorial sea] shall comply with the laws and regulations enacted by the coastal State . . . and, in particular, with such laws and regulations relating to transport and navigation."

Because it is an accepted regulation of the territorial sea itself, enforcement of navigation rules by the coastal nation could not constitute a claim to inland waters from whose seaward border the territorial sea is measured.

394 U.S. at 24-26.¹⁰

From this analysis in *United States v. Louisiana*, it is clear that reasonable regulation of navigation with respect to safety does not establish a historic claim. Regulation of navigation of that sort is not an exercise of the type of authority that is needed to establish a historic claim.

The Special Master concludes that the Rhode Island and New York pilotage statutes and their enforcement does not support a claim that Block Island Sound should be considered

¹⁰ In a note to this passage the Court stated in part:

Modern authorities are unanimous on this principle. Thus, Jessup states that "[i]t seems clear that even transient vessels must obey reasonable rules and regulations laid down by the littoral state in the interests of safety of navigation and maritime police." And he cites the United States Inland Rules as an example of such regulation of the territorial sea. Jessup, [The Law of Territorial Waters and Maritime Jurisdiction] 121, 122 n.37 [(1927)]. Shalowitz also concludes that the right of innocent passage through the territorial sea "may be conditioned upon the observance of special regulations laid down by the coastal nation for the protection of navigation . . . and other local interests." 1 Shalowitz, [Shore and Sea Boundaries] 23 [1962].

394 U.S. at 24-26 n.29. In another note to the above passage, the Court stated:

The recent United Nations study of the concept of historic waters concluded that "if the claimant State allowed the innocent passage of foreign ships through the waters claimed, it could not acquire an historic title to these waters as internal waters, only as territorial sea." Juridical Regime of Historic Waters, Including Historic Bays [2 Y.B. Int'l Law Comm'n] 23 [U.N. Doc. A/CN.4/143 (1962)]. Under that test, since the United States has not claimed the right to exclude foreign vessels from within the "Inland Water Line," that line could at most enclose historic territorial waters.

Id. at 26 n.30.

historic internal waters. The pilotage statutes are designed primarily to ensure the safety of navigation and thus are a reasonable regulation of navigation. Additionally, these statutes are applied to American and foreign vessels equally; there is no attempt to exclude foreign traffic under these statutes.

3. Rhode Island-New York Boundary Agreement

The last category of evidence relates to the boundary line between Rhode Island and New York. In 1942, Rhode Island and New York, by agreement, divided the waters of Block Island Sound between themselves. The agreement provides:

We agree that the eastern boundary of New York and the western boundary of Rhode Island shall be and is as follows: Beginning at a point (No. 174) in latitude $41^{\circ}18'16''$.249 and longitude $71^{\circ}54'28''$.477 as determined by the joint commissioners of Connecticut and Rhode Island by a memorandum of agreement dated March twenty-fifth, eighteen hundred and eighty-seven, as such memorandum of agreement is referred to in section 2 of the "State Law" constituting chapter 57 of the Consolidated Laws of the State of New York, thence south $37^{\circ}22'32''$.75 east eighty-five thousand eight hundred one and eighty-nine hundredths feet to a point designated as number 175 and thence in the same direction out to sea to the limits of the territorial waters of the two States. Provided, however, that nothing in the foregoing agreement contained shall be construed to affect existing titles to property corporeal or incorporeal held under grants heretofore made by either of said States.

Taken from H.R.J. Res. 138, 58 Stat. 672 (1944). See Appendix D ("Map of the Boundary Line Between the States of New York and Rhode Island"). The States place great emphasis on the fact that on July 1, 1944, Congress approved the agree-

ment. See H.R.J. Res. 138, 58 Stat. 672 (1944). In doing so, the Congress stated:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of the Congress of the United States be and hereby is, given to said agreement, and to each and every part thereof; and the boundaries established by said agreement are hereby approved: Provided, however, That nothing herein contained shall be construed to impair or in any manner to affect any right of the United States or jurisdiction of its courts in and over the islands or waters which form the subject of said agreement.

Id. at 673.

According to Rhode Island and New York, the existence of the boundary agreement which divides Block Island Sound between them, and the fact that the agreement has been approved by Congress, should qualify Block Island Sound as historic internal waters.¹¹

¹¹ The States also place great emphasis upon a letter dated April 8, 1969, which was sent by the Legal Advisor of the United States Department of State to the Solicitor General of the United States. U.S. Ex. 13. See also Dolan, Nov. 9, 1981, at 59-60. According to the States, the letter concludes that because a New York-Connecticut boundary agreement was approved by Congress, Long Island Sound constitutes historic internal waters. The States assert that because Congress used identical language in approving the New York-Rhode Island boundary agreement, Block Island Sound should likewise constitute historic inland waters.

The Special Master does not agree with the States' interpretation of the letter. The letter does not state that the boundary agreement between New York and Connecticut alone was sufficient reason to consider Long Island Sound a historic bay. Rather the letter states that the "status of Long Island Sound as 'historic' has never been disputed," and goes on to cite authorities supporting this statement. The letter concludes further that "[s]ince Connecticut's water boundary, as defined in the compact approved by Congress, lies wholly in inland waters there is no territorial sea offshore from Connecticut. . . ." The letter does not conclude the issue in this proceeding, nor does it significantly support the claim that Block Island Sound is a historic bay.

The Special Master concludes that the boundary agreement does not support the States' historic claim. This conclusion is based on two factors. First, it is clear from the Congressional approval of the agreement that Congress did not accept Block Island Sound as constituting internal state waters. Rather, Congress only approved the agreement as an agreement solely between two states and stated that the agreement was not to be construed so as to impair or affect any rights of the United States.

Second, the enactment of the boundary agreement, in and of itself, is insufficient to establish a historic claim as to Block Island Sound.¹² The States presented no evidence of the exercise of any authority under this agreement. Additionally, the exercise of authority that was examined under the first two categories of evidence does not measure up to the exercise of authority that is needed to establish a historic claim.

The Special Master concludes that Rhode Island and New York have *not* established a historic claim to Block Island Sound. The States presented no evidence sufficient to show an exercise of the type of authority or dominion over Block Island Sound that is required to establish a historic claim. Even if the States' evidence is accepted as demonstrating a proper exercise of authority, the evidence is still far from establishing clearly beyond doubt that the States exercised sovereignty over the waters of Block Island Sound. Additionally, it cannot be inferred from any of the evidence that any foreign nation has ever had the opportunity to acquiesce to such an exercise of authority over Block Island Sound.¹³

¹² In *United States v. California*, the Supreme Court stated:

[A] legislative declaration of jurisdiction without evidence of further active and continuous assertion of dominion over the waters is not sufficient to establish [a claim of historic inland waters].

381 U.S. at 174.

¹³ At oral argument, New York did argue, however, that there is no record of any foreign nation resisting having to take on a licensed pilot to pass through Block Island Sound. May 14, 1982 at 43-44.

V. JURIDICAL BAY DISCUSSION

A. ARTICLE 7

Since Block Island Sound is not entitled to historic bay status it is now necessary to determine whether Long Island Sound and Block Island Sound qualify as a juridical bay under Article 7 of the Convention. In regard to bays, Article 7 provides:¹⁴

Article 7

1. This article relates only to bays the coasts of which belong to a single state.

2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation.

¹⁴ A comparison of Article 7 of the Convention with the corresponding Article of the Final Draft of the Third United Nations Conference on the Law of the Sea of October 7, 1982 (U.N. Doc. A/CONF.62/122), reveals that the proposed Convention's language regarding bays is substantively identical to the language in Article 7 of the 1958 Convention.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

For the purpose of analyzing the juridical bay criteria it is helpful to separate the subsections of Article 7 according to the criteria they address. Generally, Articles 7(2) and 7(3) supply the criteria for determining whether a bay exists, and Articles 7(4) and 7(5) provide the criteria for closing a body of water that is found to be a bay. With respect to the question of whether a bay exists, Article 7(2) supplies three separate but related criteria. First, there must be a "well-marked indentation" into the coast which constitutes "more than a mere curvature of the coast." Second, the indentation must enclose an area which "is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of the indentation." (Article 7(3) provides further guidance on making this calculation.) Third, the indentation must "contain landlocked waters."

B. THEORIES OF THE PARTIES

With respect to the juridical bay approach, Rhode Island and New York set forth three different theories for applying the juridical bay formula to the geographic area in question. The first is to view Long Island as an extension of the mainland (like a peninsula) stretching out roughly parallel to the Connecticut shore. When viewed this way, Long Island serves to enclose the waters of Long Island Sound and Block Island

Sound, thereby forming a single overall juridical bay. Rhode Island and New York place the most emphasis on this theory and they argue quite extensively that, when the area is viewed in this manner, the Article 7 criteria for a juridical bay are satisfied.

The second way to apply the juridical bay test is to envision two bays as originating from the two sides of Long Island at its western end. Viewed in this manner, Long Island on its south side forms part of the bay constituting New York Harbor and on its north side forms a bay consisting of Long Island Sound and Block Island Sound.¹⁵

The third theory views Long Island and Block Island as screening islands across the entrance of a bay that stretches from Throgs Neck, New York to Point Judith, Rhode Island.¹⁶

¹⁵ This approach comes from P. Beazley, *Maritime Limits and Baselines: A Guide to their Delineation*, Special Publication No. 2, 20 (rev. 2d ed. 1978). Although a review of Beazley's analysis with respect to the two-headed bay theory leaves it unclear as to which provision of the Convention Beazley relies on, New York apparently argues that the analysis is based on Article 7. See also *infra*, note 34.

¹⁶ This theory appears to be the one adopted by the First Circuit in *Warner v. Dunlap*, when it concluded that Long Island Sound and Block Island Sound formed an Article 7 juridical bay. The First Circuit stated:

Plaintiffs contend and the defendants concede that under the semi-circle test Block Island Sound does not constitute a bay. The district court found, however, that the Convention's test ought more properly to be applied "to the entire geographical body of water enclosed within lines drawn at the East River in New York City on the west and between Point Judith, Block Island and Montauk on the east." Essentially the area enclosed would include Block Island Sound and Long Island Sound in combination; and this body of water, the court found, constitute [sic] a bay within the meaning of the Convention.

Plaintiffs contend that the district court erred in applying the semi-circle test to the combination of Long Island Sound and Block Island Sound. They claim that under the Convention a bay must be a "well-marked indentation" and "penetration." Plaintiffs assert that these criteria are not met because the Long Island Sound-Block Island Sound configuration is open at its western end where the East River separates Long Island from the "main land mass", and that when Long Island is removed from the picture there remains only "a mere curvature of the coastline" without the necessary "indenta-

(continued on next page)

Application of the juridical bay test of Article 7 under these theories would require, according to the States, that baselines be drawn across two mouths to the resulting bay; that is from Montauk Point on Long Island to a point near Southwest Point on Block Island and from Sandy Point on Block Island to Point Judith, Rhode Island. See Appendix C.

The United States asserts with regard to the application of the juridical bay test of Article 7 to Long Island Sound and Block Island Sound that when the coastline from New Jersey

tion" or "penetration". However, this claim must fail.

Under plaintiffs' analysis Long Island is to be considered "just another island off the coast" that cannot serve to define, as the district court found it did, the boundary edge of an inland bay. Yet, the Supreme Court has specifically noted that Long Island Sound "is considered inland water rather than open sea." *United States v. Maine*, 420 U.S. 515, 517 n.1, 95 S.Ct. 1155, 1156, 43 L.Ed.2d 363, 366 (1975). Further, as the district court noted, "plaintiffs' own expert could give no reason why" the semi-circle test should not be applied to the combination of Long Island Sound and Block Island Sound. The court found this to be the most "sensible" configuration upon which to apply the semi-circle test and we cannot say this judgment was improper, particularly since the Convention provides that "[w]here . . . an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths." . . . Accordingly, as the district court properly found, Block Island Sound is contained within and is a "bay" within the meaning of 46 U.S.C. 211.

532 F.2d at 769-70.

Rhode Island offers one additional approach for finding Block Island Sound a juridical bay. Rhode Island argues that the criteria of Article 7 can be applied to Block Island Sound, standing by itself, to determine that Block Island Sound is a juridical bay. With respect to this approach Rhode Island states, without giving any further authority, that application of Article 7 in this manner is made possible by the fact that Long Island Sound has been accorded historic bay status. See R.I. Pre-Hearing Memorandum at 6 n.3, 9-10. Rhode Island points out that under this approach the issue of whether Long Island should be considered part of the mainland becomes irrelevant. *Id.*

The Special Master does not find this approach to be credible. Dr. Hodgson testified that such an approach is "totally foreign to the definition of a bay in the Convention." Hodgson, Dec. 19, 1978 at 86-87. Mr. Dolan testified that Block Island Sound would not satisfy the requirements for an Article 7 bay if Block Island Sound is examined separate from Long Island Sound. Dolan, Nov. 9, 1981, at 126.

through Rhode Island is viewed there are no indentations into the mainland that will satisfy Article 7(2).¹⁷ Only if Long Island were a part of the mainland would the geographic situation satisfy the indentation requirement. After arguing that Long Island should not be considered an extension of the mainland, the United States asserts that in the event the Special Master finds that Long Island is an extension of the mainland and concludes that Long Island Sound satisfies the other Article 7 criteria, the resulting juridical bay should be closed by a line running from Montauk Point on Long Island to Watch Hill Point, Rhode Island. The normal baseline rule of Article 3 and Article 10 would still apply to the rest of Block Island Sound.

C. INDENTATION

Since the success of each party's position with regard to whether there is a juridical bay depends upon the existence of an indentation, the indentation into the coast requirement of Article 7(2) will be explored first.

In *United States v. Louisiana*, the Supreme Court stated the following:

[T]he general understanding has been — and under the Convention certainly remains — that bays are indentations in the *mainland*, and that islands off the shore are not headlands but at the most create multiple mouths to the bay.

394 U.S. at 62 (Emphasis original). The Court went on to state:

We have concluded that Article 7 does not encom-

¹⁷ When considering whether an indentation into the mainland exists, the practice of the United States is to first visually eliminate any islands in an area and then ascertain whether there are any indentations into the coast of the mainland. See U.S. Post-Trial Opening Brief at 32-33; Smith, Nov. 10, 1981 at 34-35, 134-36, 2-65; Hodgson, Dec. 19, 1978 at 71-72 (U.S. Ex. 73).

pass bays formed in part by islands which cannot realistically be considered part of the mainland. Article 7 defines bays as indentations in the "coast," a term which is used in contrast with "islands" throughout the Convention.

Id. at 67.

It is clear from this Supreme Court language that an indentation must be into the mainland for purposes of Article 7(2). After reviewing the theories offered by the parties and viewing charts of the area in question, it is also clear that there are only two possibilities which can be explored with respect to whether an indentation into the mainland exists in the area of Long Island Sound and Block Island Sound. The first inquiry to make is, whether there is an indentation into the mainland that will qualify Long Island Sound and Block Island Sound as a bay when Long Island is viewed strictly as an island thereby requiring the island to be ignored when applying the indentation test. The second inquiry is, if Long Island can be considered an extension of the mainland for Article 7 purposes, will there then be an indentation into the mainland that qualifies Long Island Sound and Block Island Sound as a bay?

1. Long Island as an Island

With respect to the first possibility, a review of the testimony reveals that the witnesses for the United States were certain that if Long Island is viewed as an island, there is no indentation into the coast, while the witnesses for the States were equivocal on the issue and their testimony does not support a finding that there is indentation.

For the Government, Robert L. Smith, the geographer with the United States Department of State, was offered as an expert in political geography and particularly as it pertains to maritime limits. He stated, in effect, that in the absence of Long Island the only indentions in the coast from New Jersey to Massachusetts are at New York Harbor and at Nar-

ragansett Bay. See Smith, Nov. 10, 1981, at 32-43. Derek W. Bowett, a professor of international law at the University of Cambridge in England, and offered as an expert in "international law and practice in matters of maritime delimitation," agreed that although the question of whether there is an indentation "is a matter of judgment," the coast to the north of Long Island Sound is a "typical curvature . . . and not a well marked indentation." Bowett, Nov. 12, 1981, at 23, 26-27. Robert D. Hodgson, the former Geographer with the United States Department of State and a former member of the Interagency Baseline Committee, the group responsible for delimiting the baseline of the United States, concluded that, without Long Island being considered an extension of the mainland, no indentation exists that will qualify Long Island Sound as part of a bay. Hodgson, Dec. 19, 1978, at 77-79 (U.S. Ex. 73). Finally, Hugh J. Dolan, an Administrative Law Judge assigned to the United States Department of Commerce and also a former member of the Interagency Baseline Committee, testified that in the absence of Long Island, there is "no more than a curvature of the . . . coast, no true indentation," nothing that meets the requirements of a bay. Dolan, Nov. 9, 1981, at 55-56.

For the States, Jeremy C. E. White, the hydrographic officer with the Port of London Authority, was offered by Rhode Island as an expert in hydrography and application of the Convention to geographic features. When asked by the Special Master what the situation would be if Long Island is not an extension of the mainland, White responded:

I'm not entirely sure that one could not consider this area as an indentation with an island in its mouth, in much the same way as in Hodgson and Alexander, they take a rather shallow indentation in the coast and say that without islands across its mouth it's not . . . lly a juridical bay; but if you put screening islands in its mouth, it really is a juridical bay; but I haven't pursued that in any great detail.

White, Nov. 12, 1981, at B-69 to B-70. Myers S. McDougal, a professor at Yale Law School and offered as an expert on

"international law and the law of the sea," stated the following when asked to assume that Long Island was "open sea."

What is the curvature is a function, again, of all the circumstances, but if the circumstances were simply open sea and a coast like that, I don't have any great difficulty with it.

....

... [I]f it was open sea or coast like that, I don't think you could satisfy Article 7.

McDougal, Jan. 12, 1982, at 86. McDougal, however, went on to state that whether Long Island is found to be an island or part of the mainland, it should still make up one side of a juridical bay for purposes of the Convention. *Id.* at 86-91. Finally, Jean Gottman, a professor of geography at the University of Oxford in England and offered as an expert on geography and particularly political and economic geography, stated the following with respect to whether an indentation in the coast exists in the absence of Long Island:

No, no, it's not an indentation that could be considered a bay under Article 7, no, but the point is that you have removed reality from here.

Gottman, Jan. 12, 1982, at 102. After further questioning, Gottman stated:

Whether indentation or curvature, it would be a matter of semantic definition. I think one could make some case for an indentation still, because the curvature northwards is very clearly noticeable.

I do not know how one can draw a line between indentation and curvature. Every indentation supposedly is a curvature. Where the curvature stops

being only a curvature and becomes an indentation,
I frankly do not know.

Id. at 103.

The Special Master concludes, based on the evidence summarized above and on the geographic configuration of the Long Island Sound and Block Island Sound area, (See Appendix B.) that when Long Island is viewed strictly as an island there is no indentation into the coast that will satisfy the requirement of Article 7(2). The coast in this area is only a mere curvature. This conclusion eliminates two of the juridical bay theories offered by the States: the approach where Long Island is envisioned as forming two bays at its western end, and the approach where Long Island and Block Island are viewed as screening islands. Without an indentation into the coast, neither theory will satisfy the requirements of Article 7.

2. Long Island as an Extension of the Mainland

With respect to the second possibility, that is, assuming Long Island is an extension of the mainland, is there an indentation which will qualify the Long Island Sound and Block Island Sound area as a bay, a review of the testimony reveals that all of the witnesses who testified on this question were generally in agreement that an indentation would exist.

On behalf of the States, Jeremy White testified:

[T]he article 7 requirements are that there shall be a deep indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and again on the premise that Long Island is part of the mainland then that is undoubtedly met.

White, Nov. 12, 1981, at 147. Myers McDougal testified with reference to Long Island making up one side of the bay that "the indentation is six times as long as the width there. . .

[so] the literal language of Article 7 seems to fit this appropriately." McDougal, Jan. 12, at 101. Last, Jean Gottman testifying for the States, stated that he considered Long Island Sound and Block Island Sound as "definitely an indentation" and "a long indentation with a rather irregular shape." Gottman, Jan. 12, 1982, at 52.

For the Government, Robert Smith testified, in effect, that based on the assumption that Long Island is a peninsula, an indentation exists which encloses Long Island Sound and part of Block Island Sound. Smith, Nov. 10, 1981, at 2-30 to 2-31. Derek Bowett testified that, assuming Long Island is a peninsula rather than an island, "you would have . . . a very well marked indentation." Bowett, Nov. 11, 1981, at 41-42. *See also id.* at 83, 99-100. Finally, Robert Hodgson apparently agreed that an indentation exists which satisfies Article 7(2) if Long Island is found to be an extension of the mainland. He stated:

There was no deep indentation of the coast in this particular area that would comprise a second bay . . . unless in going back you concede that Long Island is a part of the mainland. . . .

Hodgson, Dec. 19, 1978, at 77-78 (U.S. Ex. 73).

Based on the overwhelming evidence and the geographic configuration of the Long Island Sound and Block Island Sound area (*See Appendix B*), the Special Master concludes that if Long Island is an extension of the mainland for Article 7 purposes, an indentation into the mainland exists that satisfies the indentation requirement of Article 7(2).

In view of this determination three questions remain to be answered in this proceeding. First, under Article 7 of the Convention can a single large island be treated as an extension of the mainland thereby forming an indentation, and if so, can Long Island be considered an extension of the mainland? Second, if Long Island is treated as part of the mainland, does the resulting indentation satisfy the semi-circle test of Articles 7(2) and 7(3)? Last, if Long Island is treated

part of the mainland and the resulting indentation satisfies the semi-circle test where are the closing lines of the indentation to be located so as to enclose landlocked waters and form a juridical bay?

D. WHETHER LONG ISLAND IS AN EXTENSION OF THE MAINLAND

The initial question to be resolved is whether Long Island can be treated as part of the mainland for the purpose of creating an indentation. The analysis must be broken down into two steps: (1) whether under the terms of the Convention, islands can be treated as mainland to form an indentation; and (2) if islands can be used, whether Long Island is such an island.

1. Whether Islands Can be Treated as Part of the Mainland

The United States argues that under Article 7 islands cannot be used to form a bay and to treat an island, such as Long Island, as part of the mainland for the purpose of forming an indentation and ultimately a bay would be contrary to "proper application of the Convention."¹⁸ The Government argues that the Supreme Court in *United States v. California*, 381 U.S. 139 (1965), addressed whether coastal islands can form juridical bays and rejected the concept.¹⁹ Thus, accord-

¹⁸ The Government clarified its position with regard to whether islands can be treated as part of the mainland in its Post-Hearing Memorandum where it stated:

Our position here is not that no island can be treated as part of the mainland, but rather that, under the applicable precedents, Long Island (and Block Island) are too large and too far seaward of land to be considered as part of the mainland or the headland of any bay.

U.S. Post-Hearing Memorandum at 3.

¹⁹ In *United States v. California*, the Supreme Court rejected the argument that the Santa Barbara Channel could be considered a "fictitious bay". 381 U.S. at 170-73. The channel could not be a true Article 7 bay because the distance across the mouths of the bay (the distance between the islands and the California coast) exceeded 24 miles. *Id.* at 170. In *United States v. California*, no argument was made that the islands laying off the California coast should be considered a part of the mainland. In the present case, the parties have not argued that Long Island Sound and Block Island Sound form a "fictitious bay".

ing to the government, the "normal rule" is that juridical bays are not formed by coastal islands. Further, the Government argues that in *United States v. Louisiana*, 394 U.S. 11 (1969), the Supreme Court reaffirmed the normal rule that islands cannot be used to form juridical bays. The Government recognizes that, in *United States v. Louisiana*, the Supreme Court created an exception to the normal rule by allowing islands to be used as the headlands of a bay, but argues that the opinion does *not* suggest bays can be created behind coastal islands. The United States asserts that the *Louisiana* exception is limited to "the particular deltaic formation there at issue" such that small islands can be used as the headlands of a bay only where the shoreline is deltaic in nature, actually consisting of innumerable small islands.²⁰ The *Louisiana* criteria cannot, the Government contends under this rationale, be used to treat a large island, like Long Island, as part of the mainland.

The United States presented evidence of how coastal islands in other areas have been treated for baseline purposes to support its position that islands cannot generally be used to form bays and that the *Louisiana* exception is limited to its specific situation. One area cited by the Government is the southern coast of Alaska. U.S. Ex.M-20 through M-28. The southern coast of Alaska is made up of numerous coastal islands which the United States has *not* utilized to form juridical bays.²¹ The Government also cites Caillou Bay in Louisiana as another situation where islands have not been used to form a juridical bay. U.S. Ex. M-29, M-31. See Appendix

²⁰ The United States recognizes four limited situations where islands can be considered as part of the mainland to form a bay. First, where an island is separated from the mainland by a "river" such that the island is a bank of the river, it can be treated as mainland. Second, where an island is connected to the mainland by a causeway, and third, where an island is connected to the mainland by a low tide elevation, the island can be treated as part of the mainland. Last, where a shoreline is deltaic in nature, actually consisting of innumerable small islands, the small islands can be treated as part of the mainland. See Hodgson, Dec. 19, 1978 at 10-11; Smith, Nov. 10, 1981 at 2-8.

²¹ This portion of the Alaskan coastline has not been the subject of any litigation.

E. Caillou Bay is formed on one side by the Louisiana coast and on the other side by a group of two islands of the Isles Dernieres. These islands were not used to form an indentation. In the *Louisiana* case the Supreme Court considered Caillou Bay and stated:

Louisiana does not contend that any of the islands in question [including the Isles Dernieres of Caillou Bay] is so closely aligned with the mainland to be deemed a part of it, and we agree that none of the islands would fit that description.

394 U.S. at 67 n.88. The United States argues that the two Isles Dernieres islands are distinct coastal islands and different from the marshy deltaic islands that the Court allowed to be considered part of the mainland. Thus, according to the Government, only small marshy deltaic islands can be considered part of the mainland and coastal islands cannot be assimilated as part of the mainland and cannot be used to form juridical bays.²²

²² This Government argument is undermined by the *United States v. Louisiana* opinion it relies upon. It is significant that, in the *Louisiana* case, the Supreme Court obviously considered whether the two Isles Dernieres islands should be treated as part of the mainland for the purpose of forming an indentation. See 394 U.S. at 66-67. The Court made a factual determination that these islands could not be considered part of the mainland to form a bay. *Id.* at 67 n.88. The Government's legal conclusion that larger coastal islands cannot be used to form a bay does not follow from the Court's factual finding. The Court did *not* conclude that coastal islands may never be treated as part of the mainland.

It is also clear from the Special Master's report of July 31, 1974, in *United States v. Louisiana*, No. 9 Original, that Special Master Armstrong was definitely inclined to treat the Isles Dernieres islands as part of the mainland but felt the issue was foreclosed by the Supreme Court's prior finding in the *Louisiana* case. He stated:

One of the most difficult areas involved in this litigation is that known as Caillou Bay. It is obvious that were it not for the existence of the Isles Dernieres, there would be no question of the existence of a bay at this location, for without them there is no indentation in the coastline enclosing landlocked waters between clearly defined natural entrance points. . . . The only theory on which a bay can be said to exist at all is if the Isles Dernieres are considered as extensions of the mainland so as to form one of its shores.

(continued on next page)

Rhode Island and New York argue that Article 7 does allow islands to be treated as part of the mainland for the purpose of forming an indentation and a bay. The States argue that the language of Article 7 "clearly indicates" that a bay can be formed in part by an island. The States rely on the history of the Convention²³ and international law to support their position. According to the States, the Supreme Court, in *United States v. Louisiana*, recognized that islands can be treated as part of the mainland for the purpose of forming a juridical bay and listed some of the factors that should be considered when deciding whether a particular island should be con-

This argument appears to have been foreclosed by the holding of the Court in the second *Louisiana* opinion. . . .

....
[T]he Court independently reached the conclusion that none of the islands in the Caillou Bay area does fit the description of islands which could realistically be considered part of the mainland. In the absence of such a holding the Special Master would upon the evidence presented before him be inclined to hold that based upon their size, proximity, configuration, orientation and nature these islands would constitute an extension of the mainland and would therefore hold the Caillou Bay is a juridical bay. . . .

But the language of the Court quoted above appears to require a holding that there is no configuration in the area which meets the requirements of a bay, and therefore nothing for which a closing line could be determined.

Id. at 49-51. From the above language, it is apparent that Special Master Armstrong did not believe that the *Louisiana* exception is limited to small deltaic islands, but is equally applicable to larger coastal islands.

²³ New York Commentary of the International Law Commission (ILC) from its sessions on the text of the Convention as supporting the States' position that under Article 7 islands can be used to form bays. For example, the 1955 report of the ILC to the United Nations General Assembly states:

If, as a result of the presence of islands, an indentation which has to be established as a "bay" has more than one entrance, the sum total of the length of the different entrances will be regarded as the length of the bay. Here, the Commission's intention was to indicate that the presence of islands at the entrance to the indentation links it more closely with the territory, which may justify some alteration of the proportion between the length and the depth of the indentation. In such a case an indentation which without islands at its entrance would not fulfil the necessary conditions is to be recognized as a bay.

(continued on next page)

sidered part of the mainland. The States argue that the *Louisiana* criteria can be applied to Long Island to treat it as part of the mainland, and that the principle recognized by the Supreme Court is *not* limited to the geography of the Mississippi River delta.

The Special Master concludes that Article 7 of the Convention allows islands to be treated as part of the mainland, and in the proper circumstances an island can be used to form an indentation and consequently a juridical bay. This conclusion is supported by the Supreme Court's interpretation and application of Article 7 in *United States v. Louisiana*.²⁴

In *United States v. Louisiana*, the Supreme Court considered in two different contexts whether under the Convention islands can be used to form bays. The Court considered first, whether islands can be used as headlands of bays. 394 U.S. at 60-66. The Court stated:

No language in Article 7 or elsewhere positively excludes all islands from the meaning of the "natural entrance points" to a bay. Waters within an indentation which are "landlocked" despite the bay's wide entrance surely would not lose that characteristic on

Report of the International Law Commission to the General Assembly, U.N.Doc.A/2934 (1955), reprinted in, [1955] 2 Y.B. Int'l Law Comm'n 37, U.N. Doc.A/CN.4/SER.A/1955/Add.1 (N.Y. Ex. 9).

New York argues that the clear indication of such language is that islands may be used to form part of a bay. A review of the Summary Records of the ILC for 1955 and 1956 indicates that this language addresses the problem created by the presence of islands in the mouth of a bay (Article 7(3)). Except for the indication that the drafters of the Convention took islands into account in the one situation, the language is inapposite to the question of whether islands can be treated as part of the mainland to form an indentation.

²⁴ The above conclusion is also supported by the testimony of two United States witnesses. Robert W. Smith testified, "[K]eeping in mind the geographical circumstance which the Court was looking at [in the *Louisiana* case], . . . I tend to think that the Court was trying to develop language that could be applicable elsewhere." Smith, Nov. 10, 1981, at 2-10. Derek W. Bowett testified that under the Supreme Court decision in *United States v. Louisiana*, a fringe of islands can make up the side of a bay. Bowett, Nov. 11, 1981, at 88.

account of an additional narrow opening to the sea. That the area of a bay is delimited by the "low-water mark around the shore" does not necessarily mean that the low-water mark must be continuous.

Moreover, there is nothing in the history of the Convention or of the international law of bays which establishes that a piece of land which is technically an island can never be the headland of a bay. Of course, the general understanding has been — and under the Convention certainly remains — that bays are indentations in the *mainland*, and that islands off the shore are not headlands but at the most create multiple mouths to the bay. In most instances and on most coasts it is no doubt true that islands would play only that restricted role in the delimitation of bays. But much of the Louisiana coast does not fit the usual mold. . . .

. . . While there is little objective guidance on this question to be found in international law, the question whether a particular island is to be treated as part of the mainland would depend on such factors as its size, its distance from the mainland, and the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast. We leave to the Special Master the task of determining in the first instance — in the light of these and any other relevant criteria and any evidence he finds it helpful to consider — whether the islands which Louisiana has designated as headlands of bays are so integrally related to the mainland that they are realistically parts of the "coast" within the meaning of the Convention on the Territorial Sea and the Contiguous Zone.

Id. (Emphasis original). Second, the Court considered whether fringes of islands along the coast can form the perimeter of a bay such that the water between the islands and the main-

land will be inland waters. *Id.* at 66-73. With respect to this issue the Court stated:

We have concluded that Article 7 does not encompass bays formed in part by islands which cannot realistically be considered part of the mainland.

Id. at 67.²⁵

Additionally, the fact that the Supreme Court considered whether the Isles Dernieres of Caillou Bay should be considered part of the mainland indicates that the rationale of the *Louisiana* case is *not* a narrow exception limited to deltaic formations. If the Court had intended to limit its holding, the Court would have said that such islands could not be considered.

²⁵ The Court also recognized that other authorities hold the view that islands can be treated as part of the mainland, by saying:

"Obviously, some islands must be treated as if they were part of the mainland. The size of the island, however, cannot in itself serve as a criterion, as it must be considered in relationship to its shape, orientation and distance from the mainland." Boggs, *Delimitation of Seaward Areas under National Jurisdiction*, 45 *Am. J. Int'l. L.* 240, 258 (1951).

"Islands close to the shore may create some unique problems. They may be near, separated from the mainland by so little water that for all practical purposes the coast of the island is identified as that of the mainland." Percy, *Geographical Aspects of the Law of the Sea*, 49 *Annals of Assn. of American Geographers* No. 1, p. 1, at 9 (1959).

The Director of the Coast and Geodetic Survey Department of Commerce, has stated the following rule for the assimilation of islands to the mainland:

"The coast line should not depart from the mainland to embrace offshore islands, except where such islands either form a portico to the mainland and are so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters, or they form an integral part of a land form." Memorandum of April 18, 1961, excerpted in I Shalowitz, [*Shore and Sea Boundaries*] 161, n.125 [(1962)].

Shalowitz has recognized that "[w]ith regard to determining which islands are part of a land form and which are not, no precise standard is possible. Each case must be individually considered within the framework of the principal rule." *Id.*, at 162. And see Strohl, [*The International Law of Bays*] 76, fig. 18 [(1963)].

394 U.S. at 65-66 n.85.

Aside from the general guidelines established by the Court in *United States v. Louisiana*, three related aspects of the decision support the conclusion above. First, the decision indicates that Article 7 of the Convention is not to be read narrowly and applied strictly, but there are exceptions to the normal rules. Second, it indicates that Article 7 does not cover all the situations under which a body of water can be a juridical bay.²⁶ Last, the decision demonstrates that when dealing with different situations, a realistic and common-sense approach must be taken in interpreting the Convention. See 394 U.S. at 63-64. The law established by the Court in *United States v. Louisiana* was not drawn so narrowly as to be limited to the specific facts of the case. Rather, in the *Louisiana* case, the Court set out more general guidelines, that can be applied to other fact situations.

2. Whether Long Island Can Be Considered a Part of the Mainland.

It is now necessary to determine whether Long Island should be treated as a part of the mainland to form an indentation.

In *United States v. Louisiana*, the Supreme Court listed several factors to consider when determining whether an island

²⁶ The testimony of several witnesses address this point. See Dolan, Nov. 9, 1981, at 84; Smith, Nov. 10, 1981, at 19-20, 121-22; Gottman, Jan. 12, 1982, at 71; White, Nov. 13, 1981, at C-74. See generally, *United States v. Louisiana*, 394 U.S. at 42, 61.

The practice of the United States with regard to baselines and Article 7 indicates that the Convention does not provide for all possible situations, and arguably militates against strict application of the Convention. Several witnesses testified that the United States uses objective tests in its application of Article 7, none of which find support in the strict language of the Convention. For example, the United States developed and uses the forty-five degree test, the bisector of the two tangents test, and the shortest distance test to identify the natural headlands of a bay. See Hodgson, Dec. 19, 1978, at 6-7 (U.S. Ex. 73); Dolan, Nov. 9, 1981, at 52; Smith, Nov. 10, 1981, at 75-77, 138-40; Bowett, Nov. 11, 1981, at 45. See also Smith, Nov. 10, 1981 at 142-43, 2-1 to 2-5. The United States also follows the screening islands rule to allow islands to make up the closing line of a bay. See U.S. Post Trial Reply Brief at 11-12. See also Smith, Nov. 10, 1981 at 40-41, 142, 2-40; Bowett, Nov. 11, 1981 at 96.

should be treated as a part of the mainland. As set forth above, the Court stated:

[T]he question whether a particular island is to be treated as part of the mainland would depend on such factors as its size, its distance from the mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast.

394 U.S. at 66.²⁷ In another part of the opinion, the Court indicated that an island's "origin . . . and resultant connection with the shore" is another factor to consider. *Id.* at 65 n.84.

The Court pointed out that its enumeration of factors to consider is illustratively only, and was not intended to be an exhaustive list. *Id.* 66 at n.86. The United States maintains, however, that under Article 7 only geographic factors can be considered when determining whether an island should be

²⁷ In two notes to the opinion the Court spoke of an island's *alignment* with the mainland. In the first note the Court stated:

The United States argues that since the Convention in Article 7(3) specifically recognizes that islands may create multiple mouths to bays, it cannot be construed to permit islands to create the bays themselves. Alternatively, the Government argues that if a closing line can be drawn from one side of a bay to an island as the headland on the other side, then it must be continued from the island to the nearest point on the mainland; and the distance to the mainland must be added to that across the bay in determining whether the 24-mile test is satisfied. *These arguments, however, misconstrue the theory by which the headland is permitted to be located on the island — that the island is so closely aligned with the mainland as realistically to be considered an integral part of it.*

394 U.S. at 62 n.83 (emphasis added). In the second note the Court stated:

Louisiana does not contend that any of the islands in question is so closely aligned with the mainland as to be deemed a part of it, and we agree that none of the islands would fit that description.

Id. at 67 n.88 (emphasis added). It is possible that by speaking of an island being "closely aligned with the mainland," the Court was suggesting another factor that can be considered. The Special Master believes, however, that the court was using "aligned" as a word of art to refer to at least all the physical geographic factors it enumerated.

treated as part of the mainland. The Government does not read the Supreme Court's language as allowing consideration of other factors.²⁸ The United States maintains that consideration of factors other than geographic factors is allowed only with regard to straight baselines under Article 4 and historic bays. The States argue, however, that the above language allows factors other than pure geographic considerations to be taken into account when determining whether an island can be treated as part of the mainland. They also argue that when the Convention is read as a whole, it suggests that factors other than geographic factors can be considered.²⁹

The United States maintains that even if an island can be used to form a bay, there is no basis for concluding that Long Island constitutes a part of the mainland, because Long Island is in fact an island that is separated from the mainland

²⁸ This position is supported by Special Master Armstrong's report on July 31, 1974 in *United States v. Louisiana*, No. 9 Original. Special Master Armstrong states:

Turning now to the easternmost area in controversy. . . , it becomes necessary to establish the closing line for Bucket Bend Bay. . . . [I]t is necessary to determine whether there exist in the area islands or low-tide elevations . . . which should be considered part of the mainland. . . .

. . . .
Applying the test outlined by the Court. . . , neither the size, distance from the mainland, depth and utility of the intervening waters, shape of the low-water elevations, or their relationship to the configuration or curvature of the coast indicate [sic] that they should be assimilated to and treated as a part of the mainland. While it is true that the Court leaves open the possibility of considering other relevant criteria and states that the list given is intended to be illustrative rather than exhaustive, this appears to be intended to leave open the question of whether islands or low-water elevations which meet the five suggested specific criteria may nevertheless be so assimilated. In any event, there appear to be no other criteria in the case of the low-water elevations under consideration which would lead to a contrary conclusion.

Id. at 35-37.

²⁹ The States point out that in the *Louisiana* case it was the United States that postulated that the permanent highway connecting the Florida Keys was a basis for considering them part of the mainland. See 394 U.S. 72 n.95.

by a narrow but significantly deep and utilized channel of water — the East River. The Government focuses on one of the factors enumerated by the Supreme Court — “the depth and utility of the intervening waters” — to argue that if an island is separated from the mainland by a commercially navigable waterway, the island *cannot* be considered a part of the mainland. In support of its argument the Government presented evidence on the utilization and nature of the East River. According to the Government evidence, the East River is commercially navigable and although it has been deepened to aid navigation, the East River has been considered commercially navigable since the early 1600’s. While the East River cannot be navigated by the largest of commercial vessels in use today, in 1972 there were in excess of 77,000 commercial movements on the East River and 52 million short tons of cargo were moved on the river. Additionally, according to the Government evidence, the East River is in fact not a river but a tidal strait which is fed by the tidal flow between Long Island and lower New York harbor.³⁰ Thus, Long Island is a distinct coastal island, completely surrounded by sea water. The United States argues essentially that because of the definite geographic separation between Long Island and the mainland, Long Island cannot be considered a part of the mainland.³¹

³⁰ A “river” is a natural stream of greater volume than a creek having a fresh water source flowing generally in one direction towards a sea, lake, or other river in a more or less permanent bed or channel with defined banks or walks, with a current which may be either continuous in one direction or affected by the ebb and flow of the tidal current. The fresh water flow is controlled by the topographic difference between the source and receiving body of water. See Swanson, Nov. 11, 1981, at 3-55 to 3-56. See also Black’s Law Dictionary 1193 (5th ed. 1979).

A “strait” is a relatively narrow waterway that connects two larger bodies of water, the water movement of which is determined by the interconnected bodies. See Swanson, Nov. 11, 1981, at 3-56.

The United States argues also that because the East River is not a river, Long Island does not form the bank of a river and consequently cannot be treated as part of the mainland. See *supra* note 20.

³¹ The Government also argues that the Supreme Court decided this very issue in a note to *United States v. Louisiana*. The note reads in part:

Strohl posits that “a fringe of islands can make up one side of a bay.” Strohl, *supra*, n.23, at 72, but recognizes that the only pro-

(continued on next page)

The Government relies heavily on the findings of the Law of the Sea Task Force Committee on the Delineation of the Coastline of the United States, which is also referred to as the Baseline Committee. The Baseline Committee was an interagency committee, comprised of representatives of the Departments of State, Commerce, Interior, Transportation and Justice, that was established to determine the baseline around the United States and draw closing lines where needed. In late 1970 and early 1971 the Committee considered whether Long Island Sound and Block Island Sound could be closed as a juridical bay under Article 7. The Committee considered several alternatives and ultimately concluded that the two bodies of water could not be closed as a juridical bay. The Committee concluded that Long Island was an island that could not be considered a part of the mainland and thus the area could not qualify as an Article 7 bay. The January 4, 1971, Committee minutes state:

The Committee gave consideration to the possibility

vision of the Convention which would authorize such a baseline is Article 4. *Id.*, at 60. The conclusion is not undermined by occasional references to an insular formation as creating a "bay". See, e.g. [1955] 1 Y.B. Int. 1 L. Comm'n 211, *Bouchez*, supra n.23, at 233 (both referring to Long Island Sound); *Manchester v. Massachusetts*, 130 U.S. 240 (referring to Buzzard's Bay). Only one authority appears to assume, without discussion that a bay formed by islands would be governed by the provisions of Article 7, *Pearcy*, supra n.78, at 965. (The area in question was that between the coast of Florida and the chain of Keys curving to the south and east. The United States points out that they are linked by a permanent highway and therefore may be considered as part of the mainland.)

394 U.S. at 71-72 n.95.

The Government concludes from this footnote that the Supreme Court found that Long Island Sound was a body of water formed by an island. Therefore, the Government maintains, that since Long Island is an island, it *cannot* be considered as an extension of the mainland so as to qualify the Long Island Sound and Block Island Sound area as an indentation and a juridical bay.

After reviewing the Supreme Court's opinion in *United States v. Louisiana*, the note quoted above, and the authorities cited therein, the Special Master concludes that the Supreme Court's reference to Long Island and Long Island Sound in the fashion above does not support the proposition for which the Government offers it, and does not decide the issue presented in this proceeding.

of closing off [Long Island Sound and Block Island Sound] under the theory that it is a legal bay, in accordance with the rules contained in Article 7 of the Geneva Convention on the Territorial Sea and Contiguous Zone. However, in order for this area to qualify as a legal bay, a prior determination must be made that Long Island constitutes a part of the mainland of the United States. If Long Island is an island, then the area in question does not qualify as a bay.

In order to determine whether or not Long Island could be considered essentially mainland, detailed consideration was given to the geography of the area. Not only was the distance separating Long Island from the mainland discussed, but also the depth of the channels separating it from the mainland and the use that is made of those channels by vessels. It was concluded that Long Island could not be considered part of the mainland based on any of these factors. The Committee then discussed whether or not Long Island could be considered part of the mainland based on the theory that it forms the bank of the East River. The geographer made a detailed study of this question and consulted other experts in the field. It was his conclusion that he could not consider the East River to be an actual river because of its physical characteristics, including the presence of a unique tidal regime. Consequently, the Committee could not conclude that Long Island should be considered as part of the mainland and drew the closing lines indicated on Chart 1211.

U.S. Ex. 19. Hugh Dolan, a member of the Baseline Committee, testified that Long Island was not considered a part of the mainland by the Committee, because Long Island is separated from the mainland by the East River which is a navigable waterway and is not a true river but a tidal strait. Dolan, Nov. 9, 1981, at 55-58. Robert Hodgson, also a member of the Baseline Committee, testified that the opinion of

the Committee was that the presence of a commercially navigable channel between an island and the mainland was sufficient to keep the island from being considered a part of the mainland. Hodgson, Dec. 19, 1978, at 36-37 (U.S. Ex. 73). Hodgson continued that the presence of a commercially navigable waterway was probably only "highly indicative" that an island should not be assimilated as part of the mainland and was not an exclusive test. *Id.* at 37-38.

The States argue that whether the East River is navigable is not a consideration relevant to the present issue and they contradict the Government's evidence on the navigability of the East River. The States' evidence demonstrates that although the East River is commercially navigable today, it is not the same body of water it was 150 years ago. The ships that navigate the East River today could not have done so in the early 1800's. Prior to improvements to the East River which were begun in the mid-1800's, the controlling depth of the river was between fifteen and eighteen feet and the current was ten knots. Prior to 1845, navigation in the Hell Gate section of the East River was considered to be "extremely dangerous." Today, the controlling depth of the East River is thirty-four feet and the current has been reduced to five knots.

New York argues that the relevant consideration is whether the East River and Long Island Sound are used as a route of international navigation, or are they "used as a route of passage between two areas of open sea," and not just whether the East River is navigable. New York derives this argument from *United States v. California*, where the Supreme Court stated:

[U]nder international law as expressed in the *Corfu Channel Case*, [1949] I.C.J. Rep. 4, the International Court of Justice held that a country could not claim a strait as inland water if, in its natural state, it served as a useful route for *international* passage.

381 U.S. at 172. In *United States v. California*, the Supreme Court did not consider this point to be of controlling impor-

tance, but New York argues, nevertheless, that it was considered and for the present case is a valid consideration. New York then asserts that the East River and Long Island Sound do not connect two areas of open seas, and thus, are not used as a route of international passage.³²

Rhode Island and New York also argue that whether the East River is a river or tidal in nature is unimportant to the present issue. The States presented evidence in contrast to the Government's conclusion that the East River is a tidal strait. According to the States, the East River, although it may be tidal, is not an ordinary tidal strait, but is part of a very complex estuarine system — the Hudson River estuary.³³ The East River and Long Island Sound have sources of fresh water. There was also testimony that the flow of the Hudson River, which is tidal far beyond Manhattan Island, is present in the East River.

Rhode Island and New York presented evidence of geographic, geological, social, economic, political and historic connections between Long Island and the continental land mass, and they rely on this myriad of connections to argue that Long Island and the continental land mass should be considered a part of the mainland. The bulk of the testimony the States rely on can be grouped into two major categories: geological and socio-economic. The geological evidence dealt with the formation of Long Island and Long Island Sound. Long Island, Block Island, and portions of the coast in this

³² Myers McDougal testified that Long Island Sound does not serve as a route of international passage. McDougal, Jan. 12, 1982, at 46-47. Additionally, the Baseline Committee concluded that although the East River and Long Island Sound carry heavy coastal traffic, they do not carry international traffic. See *id.* at 8.

³³ Robert L. Swanson, the Director of the Office of Marine Pollution Assessment of the National Oceanic and Atmospheric Administration, testified that the prerequisites for an estuary are (1) a fresh water source, (2) a tidal body of water that is semi-enclosed, and (3) a tidal elevation and tidal range in that body of water. Swanson, Nov. 11, 1981, at 3-106 to 3-109. Black's Law Dictionary defines "estuary" as the mouth or lower course of a river that flows into the sea which is subject to the tide. Black's Law Dictionary 496 (5th ed. 1979).

area were formed by deposits of sediment and rocks brought from the mainland by ice sheets of the glaciers. The glaciers retreated approximately 25,000 years ago and ultimately the sea encroached on the newly formed land mass forming Long Island Sound and the other bays in the area. The socio-economic evidence dealt primarily with how the western end of Long Island is closely linked or tied to the mainland and how the two are interdependent. The western end of Long Island is part of New York City and the majority of New York City residents live on Long Island. On a daily basis there is an enormous movement of people from Long Island to the mainland and from the mainland to Long Island. Additionally, the western end of Long Island is physically connected to the mainland, either directly or indirectly through Manhattan or Staten Island, by twenty-six bridges and tunnels.³⁴ Long

³⁴ Rhode Island presented the testimony of Jeremy White, the hydrographic officer with the Port of London, in support of the position that Long Island should be treated as an extension of the mainland. White applied the analysis Peter Beazley presented in *Maritime Limits and Baselines: A Guide to Their Delineation*, Special Publication No. 2 (rev. 2d ed. 1978), to conclude that Long Island should be treated as part of the mainland. Beazley proposed objective criteria for determining when a single relatively large island lying close to the coast is situated such that two bays are formed between the island and the coast. White concluded from Beazley's criteria that Long Island is situated such that it is part of the mainland and forms two bays: New York Harbor Bay, and Long Island Sound and Block Island Sound Bay. White, Nov. 12, 1981, at 150-58, B-73.

Beazley's objective criteria require: (1) that the water area, bounded by the island, the mainland, and perpendiculars dropped from the extremities of the island to the mainland, be less than the area of the island; and (2) that the ratio of the length of the channel to its breadth (the average length of the two perpendiculars) should be greater than three to one. Beazley, *supra* at 20 (R.I. Ex. 16). White testified that he applied Beazley's tests to Long Island and Long Island Sound and found that the area of the enclosed water is 1,168 square sea miles, the area of the land is 1,213 square sea miles, and the length to breadth ratio is approximately ten to one. White, Nov. 12, 1981, at 150-158. According to White's figures Long Island and Long Island Sound satisfy Beazley's criteria. *Id.* See also U.S. Ex. 82.

Through White, Rhode Island offered the Isle of Wight, off the south coast of England, as an example of the application of Beazley's analysis. See R. I. Ex. 1A. White testified that the British government had treated the Isle of Wight as a situation where a relatively large island lying off the coast creates two bays. White, Nov. 12, 1981, at B-18 to B-24. Rhode

(continued on next page)

Island is a large island situated along the coast and at its western end is separated from the mainland by only a narrow stretch of water. The island is closely related to the mainland geographically and physically, as well as socially and economically. After taking all the factors into consideration, the Special Master concludes that Long Island can be treated as part of the mainland.³⁵ Two factors are of utmost importance to this conclusion. Long Island's geographic alignment with the coast is the first. Long Island and the coast are situated and shaped such that they enclose a large pocket of water, which closely resembles a bay. By viewing charts of the area, the bay-like appearance of the area is obvious and it becomes readily apparent that the enclosed water has many of the characteristics of a bay. Second, the geographic configuration of Long Island and the mainland forces the enclosed water to be used as one would expect a bay to be used. Ships do not pass through Long Island Sound and the East River unless they are headed for New York Harbor or ports on Long Island Sound. Ships bound for ports not in the enclosed area navigate outside of Long Island and Block Island as they pass up and down the United States coast.³⁶ Long Island Sound

Island argues that the Isle of Wight must have been considered an extension of the mainland for the purpose of applying the Convention. From the evidence, it is impossible to determine whether Beazley's criteria were applied to the Isle of Wight in an Article 7 context.

White also testified that independent of Beazley's analysis, he would consider Long Island to be an extension of the mainland for the purpose of finding an Article 7 bay, because of the close relationship between Long Island and the mainland. White, Nov. 12, 1981, at 158.

The United States argues that Beazley's theory has no standing in international law and is too "unsound" to be followed; and thus, White's testimony must be rejected.

³⁵ This conclusion is reached without considering Beazley's analysis or the testimony of White. See *supra*, note 34. The Special Master makes no ruling on the merits of Beazley's theory.

³⁶ Captain John Neary, a professional pilot with twenty-five years of ship piloting experience, testified that ships traveling along the United States coast and not bound for New York Harbor or some port on Long Island Sound, pass to the east of Block Island and do not enter Block Island Sound, Long Island Sound, or the East River. Neary, Nov. 13, 1981, at C-88 to C-91.

is not a route of international passage; ships merely pass into and out of it as one would expect ships to pass into and out of a bay.

Long Island Sound, without question, would be a juridical bay if the East River did not separate Long Island and the mainland. The fact that the East River is navigable and is a tidal strait, however, does not destroy the otherwise close relationship between Long Island and the mainland when all the factors are considered.³⁷ Long Island is so integrally related to the mainland that it should be considered an extension of the mainland. If there is ever a situation where a large coastal island will be considered a part of the mainland so the water enclosed between the island and the coast can be a juridical bay, this is it. Long Island is closely linked with the mainland; it is situated such that a body of water that resembles a bay is enclosed, and the enclosed body of water is used like a bay. Thus, the Special Master concludes that Long Island can be treated as part of the mainland to form an indentation.

E. SEMI-CIRCLE TEST

Having concluded that Long Island is to be treated as part of the mainland and as such Long Island Sound is a well-marked indentation, it is now necessary to decide whether this indentation satisfies the semi-circle test of Articles 7(2) and 7(3). The evidence on this point is uncontradicted. All witnesses who testified with respect to the semi-circle test concluded that, assuming Long Island is an extension of the

³⁷ As stated above, the decision of the Baseline Committee that Long Island Sound was not a juridical bay because Long Island could not be treated as part of the mainland was based on two factors: (1) the East River is commercially navigable, and (2) the East River is not a river but a tidal strait. The September 7, 1971, minutes of the Baseline Committee (U.S. Ex. 16) reflect that at least some of the members of the Committee felt that Long Island Sound would definitely qualify as a juridical bay except for the East River. The Special Master concludes that the Committee's conclusion based on these two factors is erroneous because it ignores the close geographic alignment between Long Island and the mainland and the obvious bay like character of Long Island Sound.

mainland, the resulting indentation satisfies the semi-circle test. Jean Gottman testified:

The semicircle test is quite easy to do. If we close by lines going from Montauk Point to Block Island and from Block Island to the continent, to Point Judith, we have a length of approximately, I believe, 23 nautical miles, or very close to that, 22 and something, I believe.

. . . .

The semicircle test very obviously applies — this is a very vast area of water, and a 24-mile diameter — therefore, a 12-mile radius — semicircle would cover much less than the vast bay formed.

Gottmann, Jan. 12, 1982, at 52-53. Likewise, Jeremy White testified:

Well, the article 7 requirements are that there shall be a deep indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and again on the premise that Long Island is part of the mainland then that is undoubtedly met. The indentation shall not be regarded as a bay unless its area is as large as or larger than the semi-circle whose diameter is a line drawn across the mouth of that indentation subject to the rules which we've talked about, about bays, islands in the mouth and whichever way you look at that I feel that that will be adequately met.

White, Nov. 12, 1981, at 147.

The Baseline Committee concluded that if Long Island was part of the mainland a juridical bay would be formed which would be closed by drawing a line from Montauk Point to Watch Hill Point. *See* Hodgson, Dec. 19, 1978, at 56 (U.S. Ex. 73). By reaching this conclusion, it is apparent that the Baseline Committee resolved that the indentation satisfied the semi-

circle test. Indeed, the Government, by arguing that if Long Island is found to be an extension of the mainland a line should be drawn from Montauk Point to Watch Hill Point to close the juridical bay, apparently concedes or has concluded that the resulting indentation satisfies the semi-circle test.

The Special Master concludes, based on the uncontradicted evidence and the Special Master's independent observation that the indentation formed by Long Island and the northern shore contain a huge area of water, that the semi-circle test of Articles 7(2) and 7(3) is satisfied no matter where the mouth of the indentation is located.

F. CLOSING LINE OF THE BAY

Having concluded that Long Island Sound is a well-marked indentation into the mainland and this indentation, no matter where its mouth is located, satisfies the semi-circle test of Article 7(2), it is now necessary to establish the proper closing line for the bay.

The United States argues that if Long Island Sound and Block Island Sound form a juridical bay, the bay is closed by a line connecting Montauk Point on Long Island and Watch Hill Point, Rhode Island. Only the western portion of Block Island Sound is included as part of the bay with this line. The Government argues that the waters east of this line are *not* a part of the bay because they are not within an indentation and they are not landlocked. This line, according to the Government, is the natural entrance, or mouth, to the bay.

Rhode Island and New York submit that the bay formed by Long Island Sound and Block Island Sound is closed by lines connecting Montauk point on Long Island with a point near Southwest Point on Block Island, and Sandy Point on Block Island with Point Judith, Rhode Island.³⁸ This closing

³⁸ Jeremy White testified that the bay should be closed by lines connecting Montauk Point on Long Island and with Lewis Point on Block Island and Sandy Point on Block Island with Point Judith, Rhode Island. See White, Nov. 12, 1981, at B-73. See also R.I. Ex. 1(d).

line includes all Block Island Sound as part of the bay. They argue that Block Island creates two mouths to the bay and as such the Convention dictates that Block Island be included in the line closing the bay.

The Convention provides some guidance with respect to drawing the closing lines of a bay. First, Articles 7(3), 7(4), and 7(5) indicate that the closing line of a bay is to be drawn between the "natural entrance points" of the indentation. The Convention does not further define natural entrance points but the concept is probably must aptly defined by its own terms; that is, the natural entrance points to an indentation are those headlands that naturally mark the seaward limit of the waters of the indentation.³⁹ Second, Articles 7(4) and 7(5)

³⁹ Several text writers have attempted to formulate workable definitions for natural entrance points. Aaron Shalowitz, in *1 Shore and Sea Boundaries* (1962), defines natural entrance points as "the apex of a sailent of the coast; the point of maximum extension of a portion of the land into the water; or a point on the shore at which there is an appreciable change in direction of the general trend of the coast." *Id.* at 63-64. Mitchell Strohl, in *The International Law of Bays* (1963), defines natural entrance points as "the points at which the coastline can most reasonably be said to turn inward to form an indentation or bay." *Id.* at 68. Robert Hodgson and Lewis Alexander, in *Towards an Objective Analysis of Special Circumstances*, Occasional Paper No. 13, (U.S. Ex. 40), define the concept as "the point where the two dimensional character of a bay . . . is replaced by that of the 'sea' or 'ocean.'" *Id.* at 10.

Additionally, three objective tests have been formulated to assist in selecting the natural entrance points: (1) the forty-five degree test; (2) the bisector of the two tangents test; and (3) the shortest distance test. Hodgson, Dec. 19, 1978, at 6-7; Dolan, Nov. 9, 1981, at 118-19. The tests are designed to determine where the direction of the shore changes from one facing the bay to one facing the sea. The primary test is the forty-five degree test. This test requires that two opposing mainland-headland points be selected and a closing line drawn between them. Lines are then drawn from each selected headland to the next inward (or landward) headland. If the resulting angles between the closing line and the two lines drawn to the inland headlands is more than 45° these mainland-headlands are the natural entrance points to the bay. If any resulting angle is less than 45°, a new mainland-headland is selected and the test is repeated until both mainland-headlands pass the test. Hodgson and Alexander, *supra*, at 10; Beazley, *supra*, at 16-17. Where the shore of a bay is a smooth curve or arc such that the forty-five degree test is inappropriate, the headlands can be selected by the bisector of the two tangents test. This test requires that lines tangent to the general direction

(continued on next page)

also specify that the closing line connecting the natural entrance points can be no more than twenty-four miles long. Article 7(5) specifies that if the distance between the natural entrance points exceeds twenty-four miles, a closing line of the proper length is to be drawn within the bay enclosing the maximum area of water possible. Third, Article 7(2) requires that the indentation enclose "landlocked" waters. The Convention does not define the term "landlocked," but a common-sense definition would require that a body of water be predominantly surrounded by land for it to be landlocked.⁴⁰ Last, Article 7(3) indicates that the closing line of a

of the curve be constructed on both the seaward and bayward sides of the coast. The angle formed at the intersection of the two tangents is bisected and the natural point is where the bisecting line meets the shore. Hodgson and Alexander, *supra*, at 10-12; Beazley, *supra*, at 17. Where there is a well-marked entrance point on one side of a bay and no identifiable headland on the other side the opposing headland can be selected by the shortest distance method; simply locate the closest point of land opposite the well-marked entrance point. Strohl, *supra*, at 62-63. The Baseline Committee applied these tests in selecting headlands. See Dolan, Nov. 9, 1981, at 116-19.

Robert Smith testified that "the overall purpose of these tests . . . is to look for the natural entrance point that will result in a line that separates the landlocked waters from those waters which are not landlocked." Smith, Nov. 10, 1981, at 2-13. See also, *id.*, at 77-78.

The Supreme Court has recognized that where there is no readily identifiable natural entrance point an objective test must be employed to select an appropriate headland. In its Supplemental Decree in *United States v. California*, 382 U.S. 448 (1966), the Court stated:

In drawing a closing line across the entrance of any body of inland water having pronounced headlands, the line shall be drawn between the points where the plane of mean lower low water meets the outermost extension of the headlands. Where there is no pronounced headland, the line shall be drawn to the point where the line of mean lower low water on the shore is intersected by the bisector of the angle formed where a line projecting the general trend of the line of mean lower low water along the open coast meets a line projecting the general trend of the line of mean lower low water along the tributary waterway.

382 U.S. at 451.

⁴⁰ Robert Hodgson testified, "The primary test the [Baseline Committee] used to determine the bay was whether it enclosed landlocked waters." Hodgson, Dec. 19, 1978, at 7 (U.S. Ex. 73).

The Convention does not define "landlocked," but several text writers have attempted to formulate workable definitions for the term. Hodgson

(continued on next page)

bay can include islands when the islands cause the indentation to have more than one mouth.

Thus, the Convention directs that the closing line of a bay be a line no more than twenty-four miles long that connects the natural entrance points of the indentation and the line must enclose within the indentation landlocked waters. Additionally, the closing lines can include islands, if the islands cause the bay to have multiple mouths.

and Alexander state the following with respect to landlocked:

The second consideration for the determination of bay is that it contains land-locked waters. *The concept of land-locked is imprecise and, as a result, may call for subjective judgments.* The semi-circular test. . . , may relate also to the character of waters being land-locked as well as to the determining of a well marked indentation. The test places an absolute, minimum limit on what can be recognized as satisfying these requirements. . . .

A semi-circle, by definition, is twice as wide as it is deep. The opening represents the maximum width. Since this definition characterizes the absolute minimum, true land-locked conditions should require that the opening (of the bay) be narrower than a principal lateral axis of the bay. . . .

However, since most bays are not circular other factors influenced by the shape of the body of water may be considered. The scale of the body must also be considered. Basically, *the character of the bay must lead to its being perceived as part of the land rather than of the sea. Or, conversely, the bay, in a practical sense, must be usefully sheltered and isolated from the sea.* Isolation or detachment from the sea must be considered the key factor.

This factor naturally relates directly both to shape and scale.

Hodgson and Alexander, *supra*, at 6, 8 (emphasis added). Beazley adopted a similar approach. He stated:

The term 'landlocked' to a seaman implies both that there shall be land in all but one direction and also that it should be close enough, at all points to provide him with shelter from all but that one direction. But shelter is a function of distance from shore, and if the bay be very large it will not afford that shelter. A bay with a 24 mile wide entrance is already exceeding the sort of distance that could be considered small enough, but the article places no restriction on the width of the entrance when determining the existence of a bay; it only imposes a twenty-four mile restriction on any baseline subsequently constructed.

Beazley, *supra*, at 13 (emphasis added).

Strohl defined landlocked similarly. He stated:

"[L]andlocked" must be given an extremely liberal interpretation. . . . It

(continued on next page)

As indicated above, the United States argues that if Long Island Sound and Block Island Sound form a bay, the bay is closed by a line connecting Montauk Point on Long Island and Watch Hill Point, Rhode Island. See Appendix C. This closing line is slightly less than fourteen miles long. The Government argues that these points are the natural entrance points to the bay. Montauk Point is a prominent extension of land marking the southern limit of the indentation and Watch Hill Point is the first prominent point when heading west along the otherwise featureless Rhode Island coast. The

appears to the author that what would satisfy the probable intent of this rule and still permit the rule to enjoy some reasonably wide use, would be for the length of the bay, from a line across its mouth to the deepest point of penetration on the landward side, to be equal to or exceed the width of the mouth. . . . Such a proportion would honor the requirement that the bay be more than a mere curvature of the coast and the body of water would be "locked" by land in three directions. . . .

. . . It should be observed that if the body of water is truly "landlocked" the need to apply the mathematical definition is removed entirely. If we were to apply the more liberal interpretation of the term "landlocked", as proposed above, the use of the mathematical formula is unnecessary.

Strohl, *supra*, at 56-57 (emphasis added).

Language in *United States v. Louisiana* also indicates that the landlocked requirement of Article 7(2) is not to be strictly applied but is to be given a more liberal interpretation. The Court stated:

Waters within an indention which are "landlocked" despite the bay's wide entrance surely would not lose that characteristic on account of an additional narrow opening to the sea.

394 U.S. at 61.

Additionally, the Court's discussion of the semi-circle test in the *Louisiana* case suggests that a bay will be considered landlocked even if it is bounded by territorial waters and open seas on one side, and on another side by another body of water which is internal waters. See generally 394 U.S. at 48-53. The fact that a bay is bounded by another body of internal waters on one side will not destroy the otherwise landlocked character of the waters.

Three witnesses also attempted to define landlocked. Robert Smith, testifying for the United States, stated that a body of water is landlocked when it is "predominantly surrounded by the mainland coast." Smith, Nov. 10, 1981 at 123. Derek Bowett, also testifying for the United States, stated that a body of water must be surrounded by land on three sides to be landlocked. Bowett, Nov. 11, 1981, at 65. Jeremy White, testifying for Rhode Island, stated that a ship entering a bay is landlocked if there is "land in all directions but seaward." White, Nov. 12, 1981, at 165.

Government asserts that a line connecting these points marks the natural entrance, or mouth, of the bay. The waters to the west of this line are landlocked and conversely, according to the Government, the waters to the east of this line are not landlocked. Likewise, the waters west of this line are within a well-marked indentation and the waters east of this line are not within an indentation.

The United States argues that under the Article 7(3) provision for islands creating multiple mouths to a bay, Block Island does not cause the bay to have two mouths and cannot be included in a closing line. The Government argues that for an island to cause a bay to have multiple mouths it must be intersected by a line connecting the mainland headlands.⁴¹ The Government relies on *United States v. Louisiana* to argue that the closing line cannot be drawn to an island seaward of a line connecting the mainland headlands. In *United States v. Louisiana*, the Court stated:

Just as the "presence of islands at the mouth of an indentation tends to link it more closely to the mainland," so also do the islands tend to separate the waters within from those without the entrance to the bay. Even waters which would be considered within the bay and therefore "landlocked" in the absence of the islands are physically excluded from the indentation if they lie seaward of the mouths between the islands. It would be anomalous indeed to say that waters are part of a bay even though they

⁴¹ The United States recognizes only three situations where islands may be utilized in drawing bay closing lines. First, when an island is intersected by a direct line between the mainland headlands, the island will form a new entrance to the bay and form a part of the line. Second, when an island is closely related and associated with an adjacent mainland headland, the island may itself constitute a headland of the bay. Third, when an island or group of islands "screen" the mouth of a bay such that they block more than one-half of the opening they will be considered to form the natural closure to the bay even if they are not situated immediately in the mouth of the bay. U.S. Post Trial Reply Brief at 11. See also Smith, Nov. 10, 1981, at 40-50. This view is also adopted by Hodgson and Alexander. See Hodgson and Alexander, *supra*, at 12-20. Block Island clearly does not qualify as a headland or screening island.

lie outside its natural entrance points. No doubt there could be islands which would not, whether because of their size, shape, or relationships to the mainland, be said to create more than one mouth to the bay.

394 U.S. at 58.

The Baseline Committee also took the view that if an island was not intersected by a line connecting the mainland headlands, the island would not affect the location of the baseline. *See Dolan*, Nov. 9, 1981, at 116-17.

Based on this interpretation of Article 7(3), the Government argues that Block Island is too far seaward of a line connecting any conceivable mainland headlands to be included in the closing line of the bay. The Government also argues that to draw the closing line of the bay to include Block Island would be tantamount to using straight baselines to close the bay.

Rhode Island and New York argue that all of Block Island Sound is included within the bay and the bay should be closed by lines connecting Montauk Point with a point near Southwest Point on Block Island, and Sandy Point on Block Island with Point Judith, Rhode Island. *See Appendix C*. The line connecting these points is approximately twenty-two miles long. They argue that Block Island Sound, when considered with Long Island Sound, satisfies the Article 7 criteria, and thus, Block Island must be included in the closing line of the bay.

In support of their position, the States argue first that Block Island Sound contains landlocked waters. They contend that Block Island and the submerged obstacles located between Montauk Point and Block Island cause the water of Block Island Sound to be landlocked.⁴²

⁴² Only two witnesses testified that Block Island Sound is landlocked. Jean Gottman, the professor of geography at the University of Oxford in England who testified for New York, concluded that Block Island Sound

(continued on next page)

Next, the States argue that Article 7(3) of the Convention allows closing lines to be drawn to islands seaward of a line connecting the mainland headlands as long as the island creates multiple mouths to the bay. They rely on the actual wording of Article 7(3) to support this point. Article 7(3) provides:

Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths.

Indeed, in *United States v. Louisiana*, the Supreme Court recognized that "Article 7(3) contains no requirement that islands be intersected by a mainland-to-mainland closing line; rather it speaks only of multiple mouths 'because of the presence of islands.'" 394 U.S. at 59 n.79. The States also rely on Aaron Shalowitz who proposed drawing closing lines to a seaward island in 1 *Shore and Sea Boundaries* (1962). He stated:

Another facet of the closing-line rule that requires interpretation is where islands are situated close to

is landlocked by Long Island, Block Island, and the continent, and that the "sill" between Montauk Point and Block Island caused the waters of Block Island Sound to have a "different character" than the waters outside Block Island Sound. Gottman, Jan. 12, 1982, at 88-91.

Jeremy White developed an objective test for determining when a body of water is landlocked. His test is based on the observation that if a ship is on the closing line of a bay (the line separating the landlocked waters of the bay from the water external to the bay), the angle between the ship and the two headlands, using the ship as the vertex of the angle, is 180 degrees. If the ship proceeds into the bay the angle formed on the seaward side is less than 180 degrees. White, thus, concludes that any point in a bay is landlocked when the sea area, or area of sea horizon, is less than 180 degrees. White, Nov. 12, 1981 at B-1 to B-13, Nov. 13, 1981 at C-54 to C-59. According to White, the test also works when there is an island in the mouth of the bay. The test takes into account the size, shape, and orientation of the island, how far seaward the island is, and how far the island is situated from the headlands of the bay. See *id.* White applied the test to Block Island Sound and found it to be landlocked. White, Nov. 12, 1981, at B-8 to B-13. See R.I. Ex. 1(d), 1(e) and 1(f).

The Special Master attaches no weight to the test White developed for determining when a body of water is landlocked, or White's conclusions.

the entrance of an indentation that satisfies the semicircular rule for bays. How is the closing line to be drawn where an island lies to the landward of the line joining the headlands? And what is the treatment for an island lying to seaward of such line? Neither situation is provided for in the convention or in the draft rules of the ILC. A reasonable interpretation would be to draw a direct line between headlands for the first case . . . , but to the island from each headland for the second case. . . .

Shalowitz, *supra*, at 225 (R.I. Ex. 18). In a note to the above passage, Shalowitz stated:

The Basis for this interpretation is the observation of the ILC that the presence of islands at the mouth of an indentation tends to link it more closely to the mainland. . . . It would seem to follow that where a choice of lines exists that line be selected that encloses the greatest area of inland waters. This is consistent with Art. 7, par. 5 of the convention which calls for a closing line to be drawn that encloses the maximum area of water possible, and with par. 3 of the article which allows islands within an indentation to be considered part of the water area. The rule proposed would still leave unresolved the question of how far seaward from the headland line islands could be in order to be incorporated under the rule. The best solution would be to consider each case on its merits and apply a rule of reason. A more restrictive rule for the second case would be to join the island to each headland only if some part of the island is on a direct headland-to-headland line. This would also be in the interest of least encroachment on freedom of the seas.

Id. at 225 n.38.⁴³

⁴³ Rhode Island also asserts that White's angles test for landlocked waters, *see supra* note 42, can be used to move a closing line out to a seaward island. Rhode Island argues that if the waters landward of the island pass White's test, then the island can properly be included in the closing line of the bay.

Lastly, the States argue that factually Block Island creates two mouths to the bay.⁴⁴ Rhode Island's evidence on this point indicates that ships heading into the two sounds pass to the north of Block Island, between Block Island and Point Judith, and do not normally traverse between Block Island and Montauk Point. The water lying between Block Island and Montauk Point is not used by ships since there is a heavy swell in the area and there are submerged hazards between the two islands. *See* Neary, Nov. 13, 1981, at C-92 to C-94.

The Baseline Committee considered where the closing line of the bay would be, assuming *arguendo*, that the two sounds were a juridical bay. The Committee considered closing the bay (1) from Montauk Point to Watch Hill Point; (2) from Montauk Point to Point Judith, Rhode Island; and (3) from Montauk Point to Block Island and Block Island to Point Judith, Rhode Island. U.S. Ex. 18, 19; Dolan, Nov. 9, 1981 at 61. *See* Appendix C. The Committee concluded that if Long Island Sound and Block Island Sound formed a juridical bay it would be closed between Montauk Point and Watch Hill Point. Dolan, Nov. 9, 1981, at 62, 134-35; Hodgson, Dec. 19, 1978, at 51-56. *See* U.S. Ex. 18. The Montauk Point to Point Judith closing line was rejected because the line exceeded twenty-four miles. Dolan, Nov. 9, 1981, at 62. A closing line from Montauk Point to the Point Judith harbor works, which would be less than twenty-four miles long, was rejected because the Committee had some doubts about using man-made harbor works as the headland of a bay. *Id.* at 62, 122.⁴⁵

⁴⁴ New York also argues that if the closing line urged by the states is not accepted, New York and Rhode Island, as well as the United States, will be deprived of their fundamental "jurisdictional rights."

⁴⁵ Two witnesses contradicted the Baseline Committee's conclusion that closing lines should not be drawn to man-made harbor works. Jean Gottman testified that Article 8 of the Convention allows closing lines to be drawn to harbor works. Gottman, Jan. 12, 1982 at 55, 69-70. Article 8 provides:

For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast.

Robert Smith testified that using harbor works as headland presented

(continued on next page)

The Committee rejected these closing lines and the closing lines to Block Island, because the Committee concluded that east of a Montauk Point to Watch Hill Point line there is no indentation, the waters are not landlocked, and the nature of the coast did not permit a determination that the waters were part of a bay. *Id.* at 120-21, 126.

On this question the Special Master agrees with the findings of the Baseline Committee and concludes that the closing for the bay is a line between Montauk Point on Long Island and Watch Hill Point, Rhode Island. Montauk Point is one prominent point marking the separation between the waters within the indentation and the waters outside the indentation, and is the clear natural entrance point on the south side of the indentation. Watch Hill Point is the first prominent point on the Rhode Island coast, it is almost due north of Montauk Point, and it also marks the separation between the waters within the indentation and the waters outside the indentation, thus, Watch Hill Point is the logical natural entrance point on the north side of the indentation.

The parties agree that the waters on Long Island Sound are landlocked and it is clear that the waters west of a closing line between Montauk Point and Watch Hill Point are landlocked, while the waters east of this line are not landlocked. The waters east of Montauk Point and Watch Hill Point are exposed to the open sea on two sides and consequently are not predominantly surrounded by land or sheltered from the sea. Upon viewing charts of the area, there is no perception that these waters are part of the land rather than open sea.

no problems under the Convention. Smith, Nov. 10, 1981, at 130.

Jeremy White considered a Montauk Point to Point Judith harbor works closing line and rejected the line because the harbor works did not satisfy the forty-five degree test for selecting headlands. White, Nov. 13, 1981, at C-52.

The Special Master does not find it necessary to decide whether harbor works can be used as headlands. The Point Judith harbor works and Point Judith are not appropriate headlands of the bay because they do not mark the entrance to the indentation but are located well outside the indentation. Additionally, a closing line drawn to either point would enclose waters that are not landlocked.

Conversely, the waters west of Montauk Point and Watch Hill Point satisfy all the criteria for being landlocked. Long Island Sound and Block Island Sound west of Montauk Point and Watch Hill Point are surrounded by land on all but one side and are usefully sheltered and isolated from the sea. The waters west of a line connecting Montauk Point and Watch Hill Point are landlocked.

Block Island cannot be included in the closing line of the bay for several reasons. First, Block Island is located well outside the indentation which begins at the Montauk Point to Watch Hill Point Line. Second, if the closing line included Block Island, there would be waters inside the closing line which are not landlocked. Third, the natural entrance or mouth to the indentation is along the Montauk Point to Watch Hill Point line and Block Island does not form the mouth to the bay or cause the bay to have multiple mouths. Last, Block Island is too far seaward of *any* mainland-to-mainland closing line to consider altering the closing line to include Block Island.⁴⁶

Therefore, the Special Master concludes that the natural mouth to the indentation which is formed by Long Island being treated a part of the mainland, lies between Montauk Point on Long Island and Watch Hill Point, Rhode Island, and the indentation is closed by a line connecting these two points.

VI. CONCLUSION

The Special Master finds that Long Island Sound and Block Island Sound west of a line between Montauk Point on Long Island and Watch Hill Point, Rhode Island, is a juridical bay

⁴⁶ Since Block Island is too far seaward to have a closing line drawn to it even under Shalowitz's proposition, it is not necessary to decide whether under Article 7(3) an island must be intersected by a line connecting the mainland headlands of a bay before it will cause the indentation to have more than one mouth and the island will be included in the closing line of the bay.

under Article 7 of the Convention on the Territorial Sea and Contiguous Zone. This juridical bay is closed by a line connecting Montauk Point and Watch Hill Point. The Special Master also finds that Block Island Sound is *not* a historic bay under Article 7(6). Thus, the waters west of the closing line to the juridical bay are internal state waters and the waters east of this closing line are territorial waters and high seas.

Based on the foregoing, the Special Master concludes that the legal coastline (or baseline) in the disputed area is the ordinary low water line along the mainland beginning at the Massachusetts and Rhode Island border to a point off Sakonnet Point, then a straight closing line west to Point Judith, then the ordinary low water line along the mainland to Watch Hill Point, then a straight closing line south to Montauk Point on Long Island. The legal coastline of Block Island is the ordinary low water line around Block Island. The territorial waters of the United States are measured from this baseline.

VII. RECOMMENDATIONS

The Special Master recommends that the parties be directed to submit to the Court forms of a declaratory decree in accord with the foregoing findings and conclusions and drawn with the necessary technical precision to carry them fully into effect.

The decree should provide that each party bear its own costs and that the actual expenses of the Special Master be borne by the parties in equal shares. It should also reserve the jurisdiction of the Court to entertain such further proceedings, enter such orders and issue such writs as may from time to time be deemed necessary or advisable to supplement the decree and give it proper force and effect.

Respectfully submitted,

Walter E. Hoffman
Special Master

APPENDIX A

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 35, Original

APPENDIX A
STIPULATION OF PARTIES
No. 35, ORIGINAL

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF MAINE (RHODE ISLAND AND NEW YORK),

Defendants.

BEFORE THE SPECIAL MASTER

STIPULATION

For purposes of this litigation, the United States, the State of Rhode Island and Providence Plantations and the State of New York do make the following stipulation:

1. By agreement of all parties, the United States requested Dr. Robert Smith, Office of the Geographer, Department of State, to measure certain distances specified by name.

2. To conduct these measurements, Dr. Robert Smith utilized the charts identified on Attachment I to this stipulation, and selected points in the vicinity of the identified name which could be described by latitude and longitude. The points are also identified on Attachment I.

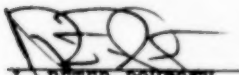
3. While Dr. Smith endeavored to select points which marked the geographical feature identified, no party asserts or accepts by this stipulation that the named point would, for purposes of baseline delimitation, necessarily be found at the coordinates selected.

4. Where the large scale chart indicated a possible choice of points in a named area, Dr. Smith utilized more than one point in his measurements. These measurements from point to point are identified in Attachment II to this stipulation.

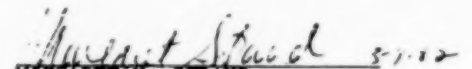
5. With the above caveats, the parties agree that the measurements identified on Attachments I and II are accurate.

Respectfully submitted,

FOR RHODE ISLAND


J. PETER DOHERTY
Special Assistant Attorney
General


FOR THE UNITED STATES


MARGARET N. STRAND
Attorney
Department of Justice
Land and Natural Resources Division
Washington, D. C. 20503

FOR NEW YORK


JOHN P. COFFEY
Assistant Attorney General

Approved:


WALTER E. HOFFMAN
SPECIAL MASTER
4/23/82

Attachment I

Charts and Basepoints

NOS 13219, 1:15,000 (5th ed., Jan. 3/76)

1. Point Judith

41°21'35.3"N, 71°28'53.5"W

2. Point Judith Harborworks

- a. 41°21'31.8"N, 71°29'37"W
- b. 41°21'14.4"N, 71°30'29.3"W
- c. 41°21'16.3"N, 71°30'38"W

NOS 13217, 1:15,000 (8th ed., Dec. 22/79)
Block Island

3. Sandy Point (low-water line)

41°14'27.9"N, 71°34'32.9"W

4. Point southwest of Southwest Point

41°09'14"N, 71°36'47.9"W

5. Lewis Point

41°08'47.3"N, 71°36'00"W

NOS 13209, 1:40,000 (14th ed., Feb. 17/79)

6. Montauk Point

- a. 41°04'14"N, 71°51'23"W
- b. 41°04'18"N, 71°51'24"W
- c. 41°04'23"N, 71°51'26"W

NOS 13214, 1:20,000 (21st ed., Aug. 25/79)

7. Watch Hill

41°18'12.1"N, 71°51'33"W

NOS 13215 1:40,000 (9th ed., Apr. 12/80)

8. Weekapaug, R.I.

- a. 41°19'29"N, 71°45'07"W
- b. 41°19'31"N, 71°45'09"W

NOS 12366, 1:20,000 (17th ed., Sept. 29/79)

9. Willets Point

40°47'47"N, 73°46'47"W

10. Throgs Neck

40°48'17"N, 73°47'25"W

NOS 12326, 1:80,000 (34th ed., Jan. 17/81)

11. Sandy Hook

40°28'09"N, 73°59'50"W

NOS 12350, 1:20,000 (47th ed., Dec. 27/80)

12. Rockaway Point

40°32'24"N, 73°56'29"W

NOS 13205, 1:80,000 (26th ed., Feb. 21/81)
Published Closing Lines

13. Culloden Point

41°04'24"N, 71°57'24"W

14. Orient Point

41°09'46"N, 72°13'41"W

15. SW Plum I.

41°09'58"N, 72°12'08"W

16. NE Plum I.

41°11'19"N, 72°09'46"W

17. Race Point (Fisher I.)

41°14'59"N, 72°02'20"W

18. East Point (Fisher I.)

41°17'30"N, 71°58'23"W

19. Napatree Point

41°18'19"N, 71°53'08"W

Attachment II

Distances between points; coordinates taken from referenced points in Attachment I. All distances are nautical miles.

1. Point Judith, R.I. to Sandy Point (Block Island)
point 1 to point 3 = 8.3

2. Point Judith Harborworks to Sandy Point (Block Island)
point 3 to point 2a = 8.0
2b = 7.4
2c = 7.4

3. Point southwest of Southwest Point (Block Island) to Montauk Point, N.Y.
point 4 to point 6a = 13.8
6b = 13.8
6c = 13.8

4. Lewis Point (Block Island) to Montauk Point, N.Y.
point 5 to point 6a = 12.5
6b = 12.5
6c = 12.5

5. Montauk Point, N.Y. to Point Judith, R.I.
point 6a to point 1 = 24.3
6b to point 1 = 24.2
6c to point 1 = 24.2

6. Montauk Point, N.Y. to Point Judith Harborworks
point 6a to point 2a = 23.8
point 6b to point 2a = 23.8
point 6c to point 2a = 23.8

point 6a to point 2b = 23.2
point 6b to point 2b = 23.1
point 6c to point 2b = 23.1

point 6a to point 2c = 23.1
point 6b to point 2c = 23.1
point 6c to point 2c = 23.1

7. Montauk Point, N.Y. to Watch Hill, R.I.
point 6b to point 7 = 13.9
point 6c to point 7 = 13.8

8. Montauk Point, N.Y. to Weekapaug Point, R.I.
point 6a to point 8a = 16.0
point 6b to point 8a = 15.9
point 6c to point 8a = 15.8

point 6a to point 8b = 16.0
point 6b to point 8b = 15.9
point 6c to point 8b = 15.9

9. Throgs Neck, N.Y. to Willet's Point
point 10 to point 9 = 0.70
10. Rockaway Point to Sandy Hook, N.J.
point 12 to point 11 = 4.9
11. Culloden Point to Orient Point
point 13 to point 14 = 13.4
12. Orient Point to SW Plum I.
point 14 to point 15 = 1.2
13. NE Plum I. to Race Point (Fisher I.)
point 16 to point 17 = 6.7
14. East Point (Fisher I.) to Napatree Point
point 18 to point 19 = 1.9

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR ORIGINAL COPY AT THE TIME
OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED,
A NEW FICHE WILL BE ISSUED.

APPENDIX B



UNITED STATES - EAST COAST

APPROACHES TO NEW YORK NANTUCKET SHOALS TO FIVE FATHOM BANK

LORAN-C GENERAL EXPLANATION

LORAN-C FREQUENCY 100kHz.
PULSE REPETITION INTERVAL
9960 99,600 Microseconds
STATION TYPE DESIGNATORS: (Not individual station
letter designations).
M Master
W Secondary
X Secondary
Y Secondary
Z Secondary

EXAMPLE: 9960-X

RATES ON THIS CHART

9960-W 9960-X 9960-Y 9960-Z

The Loran-C lines of position overprinted on this chart have been prepared for use with ground wave signals and are presently compensated only for theoretical propagation delays which have not yet been verified by observed data. Mariners are cautioned not to rely entirely on the lattices in inshore waters. Skywave corrections are not provided.

Mercator Projection
Scale 1:400,000 at Lat. 40°
North American 1927 Datum

SOUNDINGS IN FATHOMS
AT MEAN LOW WATER

(For offshore navigation only)

NOTE S

Regulations for Ocean Dumping Sites are contained in 40 CFR, Parts 220-229. Additional information concerning the regulations and requirements for use of the sites may be obtained from Environmental Protection Agency (EPA). See U.S. Coast Pilot appendix for addresses of EPA offices.

CAUTION

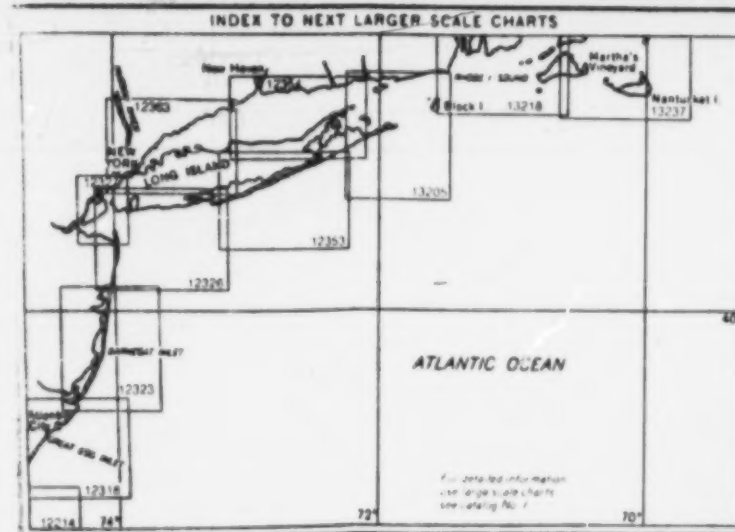
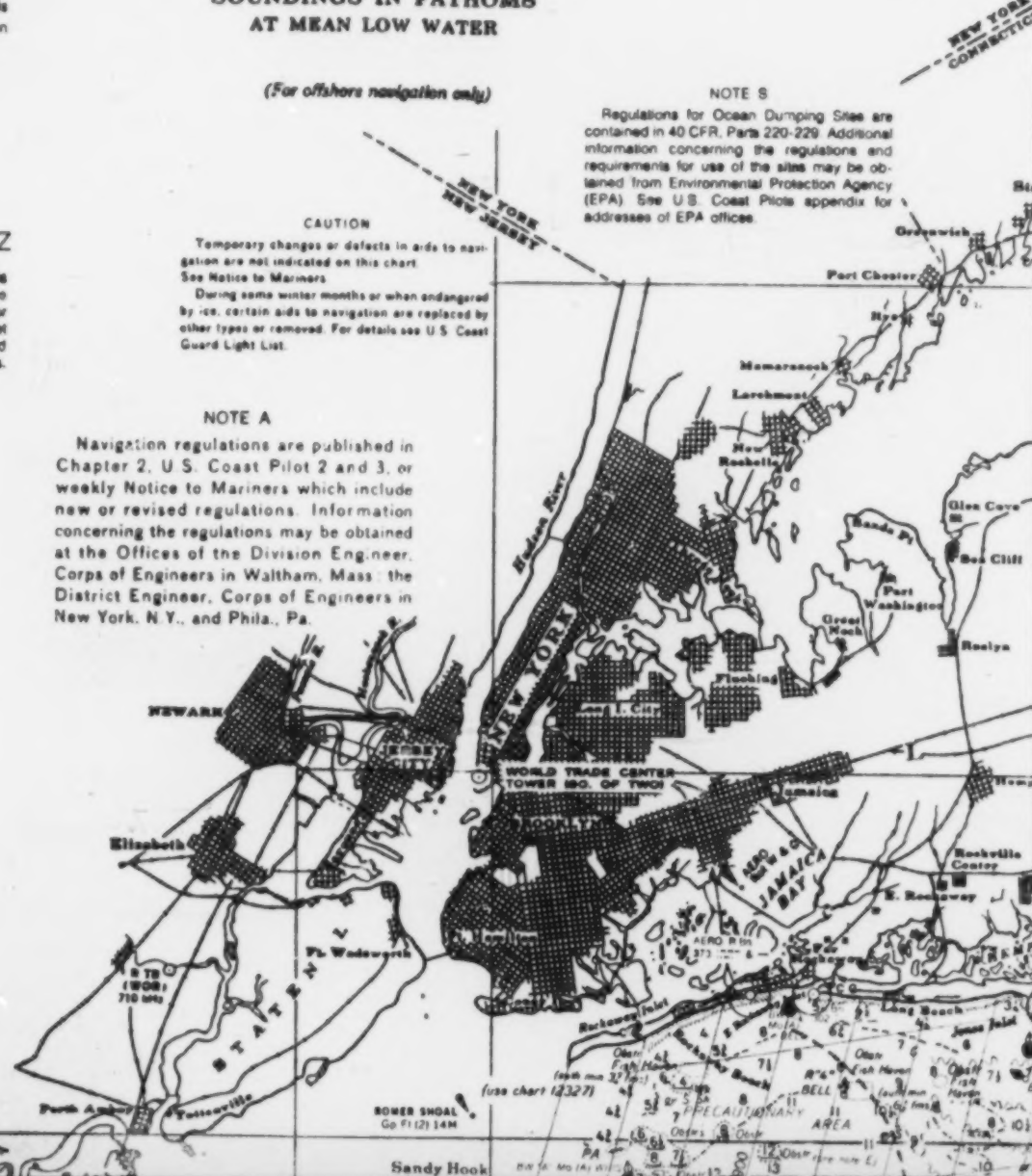
Temporary changes or defects in aids to navigation are not indicated on this chart. See Notice to Mariners. During some winter months or when endangered by ice, certain aids to navigation are replaced by other types or removed. For details see U.S. Coast Guard Light List.

NOTE A

Navigation regulations are published in Chapter 2, U.S. Coast Pilot 2 and 3, or weekly Notice to Mariners which include new or revised regulations. Information concerning the regulations may be obtained at the Offices of the Division Engineer, Corps of Engineers in Waltham, Mass.; the District Engineer, Corps of Engineers in New York, N.Y., and Phila., Pa.

RADAR REFLECTORS

Radar reflectors have been placed on many floating aids to navigation. Individual radar reflector identification on these aids has been omitted from this chart.



PRECAUTIONARY AREAS

Within the Precautionary Areas may consist of vessels making on between operating in Ambrose or Sandy Hook Channels or the established traffic lanes; or vessels operating between Port Bay and Buzzards Bay and one of the established traffic lanes are advised to exercise extreme care in navigating within. The normal Pilot Cruising Area is outlined by a triangular

CABLE AND PIPELINE AREAS

The cable and pipeline areas falling within the areas of the larger scale charts are shown thereon and are not repeated in this chart.

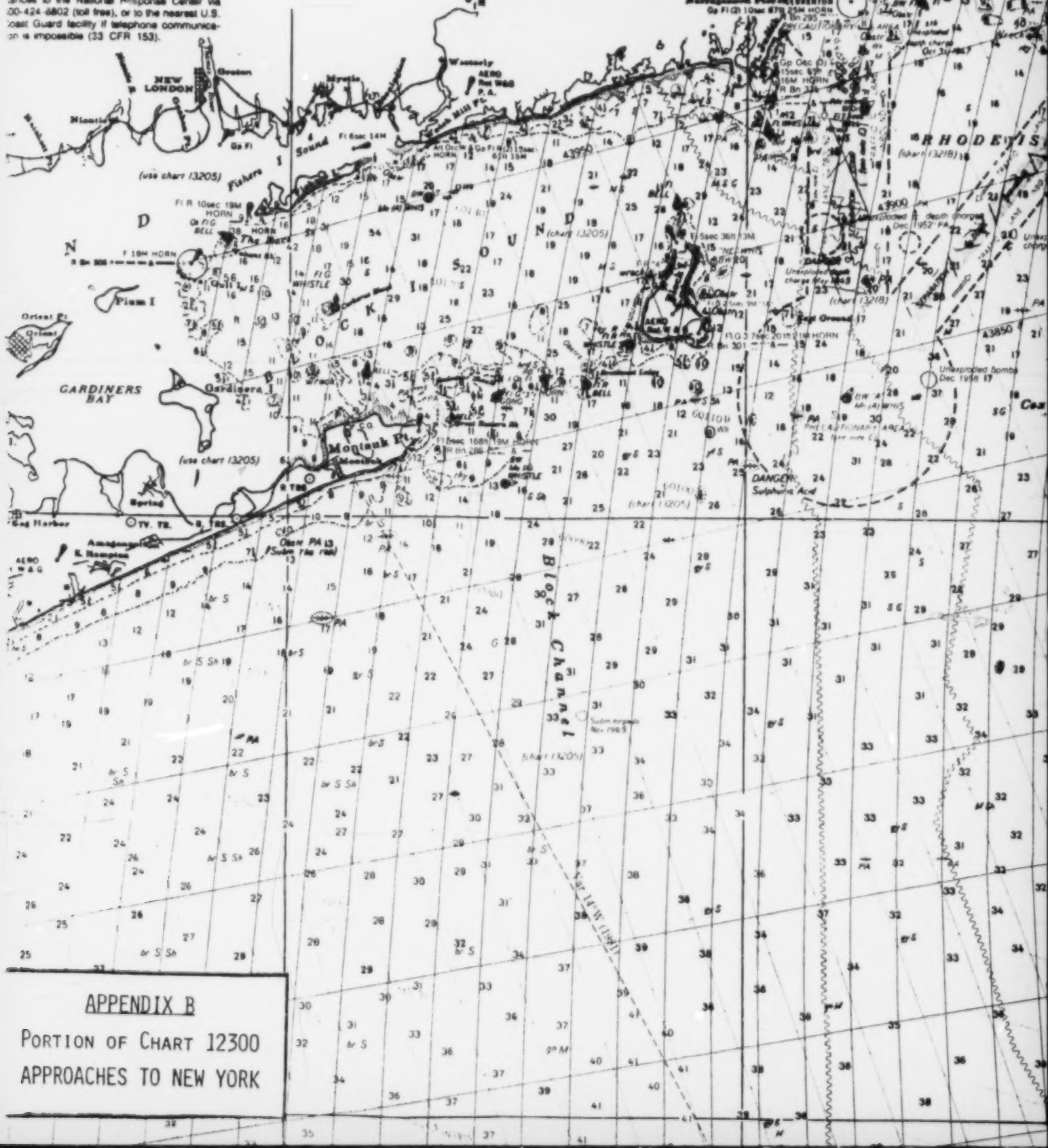
NOTE D

TRAFFIC SEPARATION SCHEME

Recommended traffic lanes have been established for the approaches to Boston Harbor. See charts 13267 and 13200.

POLLUTION REPORTS

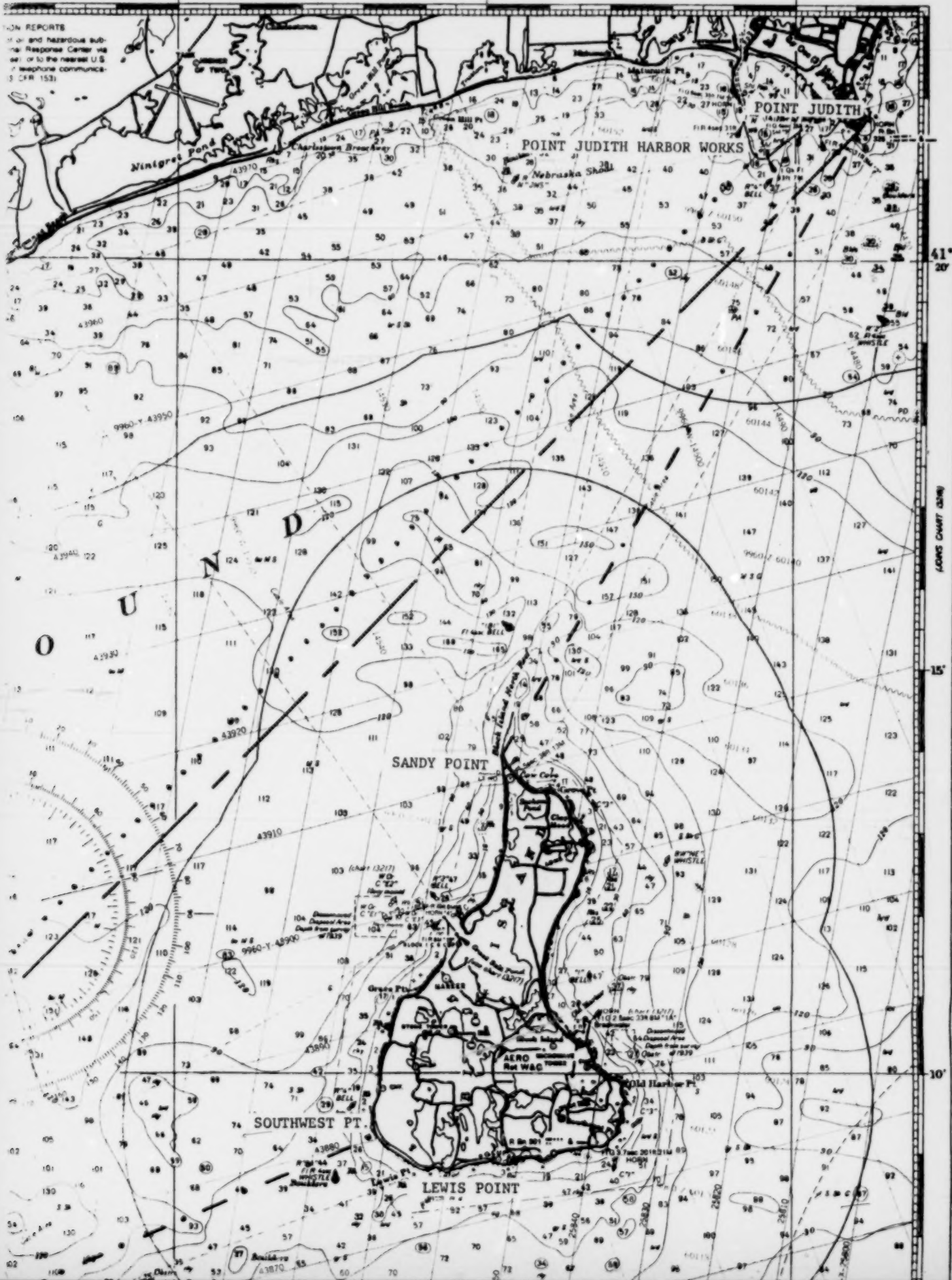
Report all spills of oil and hazardous substances to the National Response Center via 800-424-6802 (toll free), or to the nearest U.S. Coast Guard facility if telephone communication is impossible (33 CFR 153).



APPENDIX C

71°30'

to an oil and hazardous substance Response Center via radio or to the nearest U.S. Coast Guard telephone communication center (33 CFR 153).



RADAR REFLECTORS
Radar reflectors have been placed on many floating aids to navigation. Individual radar reflector identification on these aids has been omitted from this chart.

CAUTION
Only marine radiobeacons have been calibrated for surface use. Limitations on the use of certain other radio signals as aids to marine navigation can be found in the U.S. Coast Guard Light List and Defense Mapping Agency Hydrographic/Topographic Center Publication 117 (A & B).
Radio direction-finder bearings to commercial broadcasting stations are subject to error and should be used with caution.
Station positions are shown thus:
○ (Accurate location) ◐ (Approximate location)

ABBREVIATIONS (For complete list of Symbols and Abbreviations, see Chart No. 1)
Lights (lights are white unless otherwise indicated)
F. fixed Mo. (A) moored side OBS. obscured Rot. rotating
Fl. flashing Q. occulting WH. white SEC. sector
Qk. quick AL. alternating DIA. diaphane m. minutes
Gr. group I. Q. interrupted quick M. nautical miles sec. seconds
E. let equal interval
Buys: T.S. temporary buoy R. red B. black Or. orange W. white
C. can S. spar R. red G. green Y. yellow
Bottom characterizations:
Cl. clay M. mud Sd. sand Br. brown Gr. gray
Co. coral Rk. rock Rky. rocky Bk. black Rd. red
G. gravel S. sand Sft. soft Bl. blue Wk. white
Gr. grass Sh. shells Slt. stony Gn. green Yl. yellow
Unexpl. rock, obstruction, or shoal except clear to the depth indicated
Beacon that cover and uncover, with heights in feet above datum of soundings
AERO. aerobeacon R. Bu. radiobeacon C. G. Coast Guard station
Ph. daybeacon R. TR. radio tower D.F.S. distance finding station
WTH. authorized. Obs. obstruction. P.A. position approximate. E.D. entrance doubtful

HEIGHTS
Heights in feet above Mean High Water

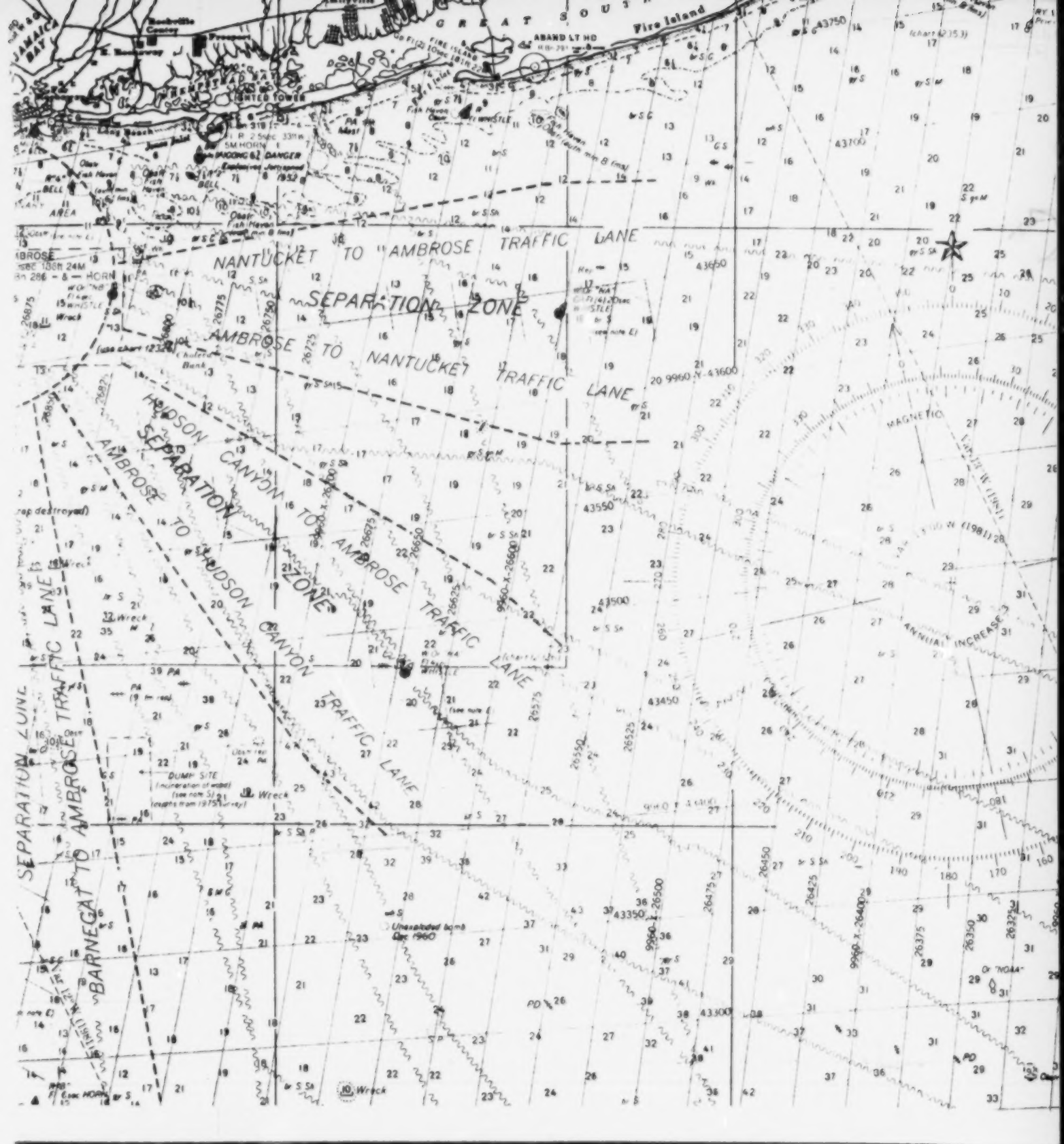
AUTHORITIES
Hydrography and topography by the National Ocean Survey with additional data from the U.S. Coast Guard.

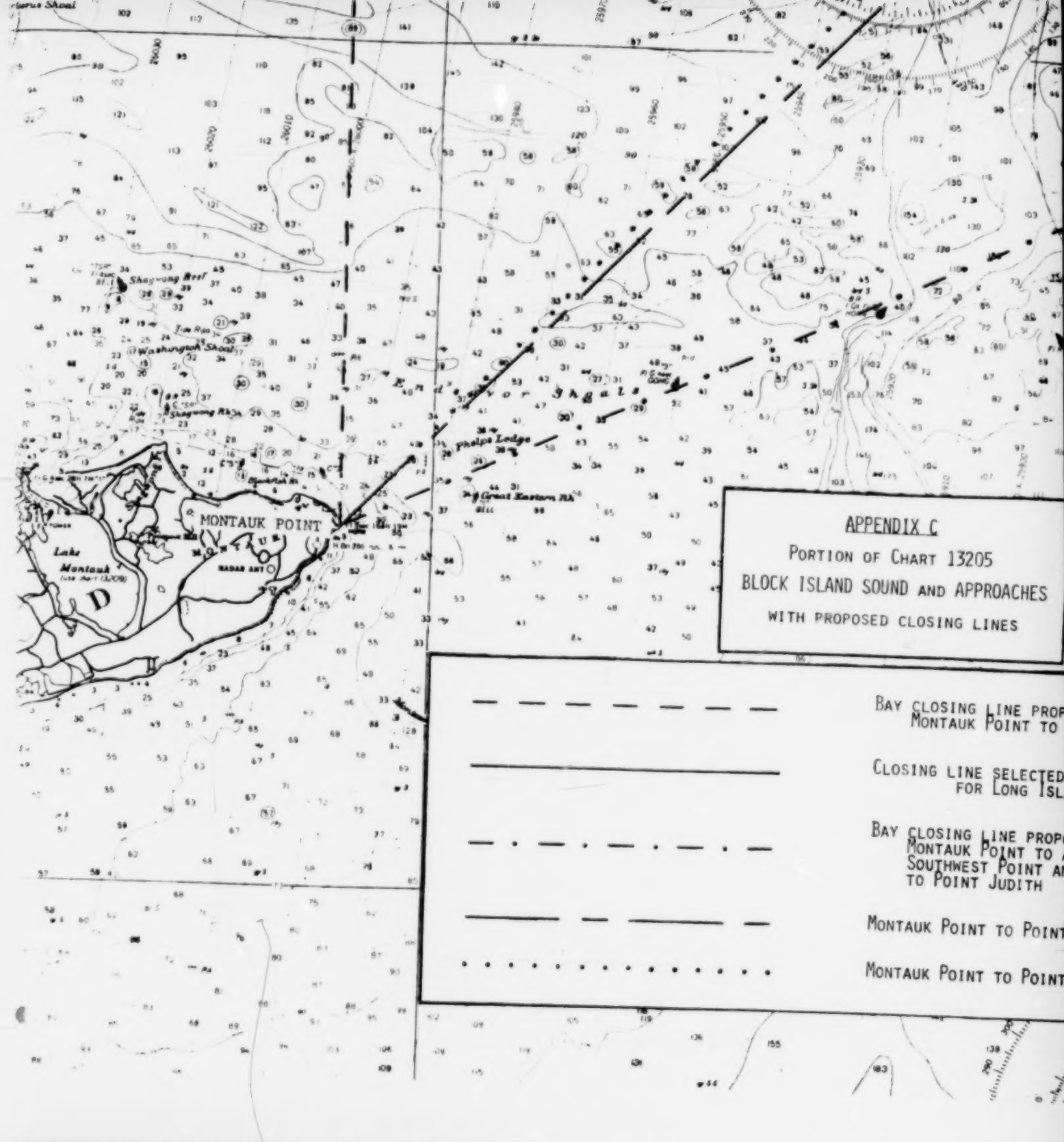
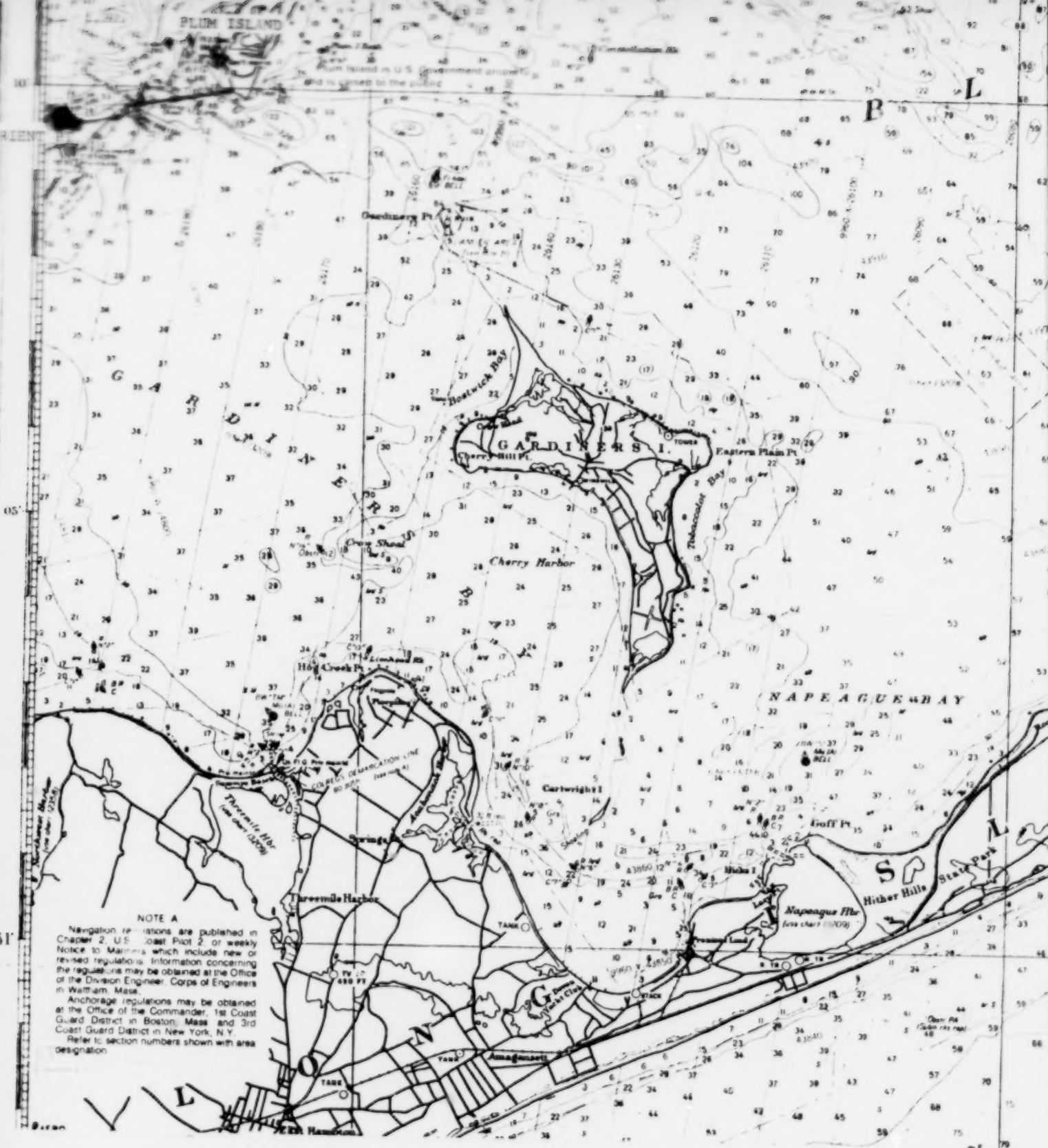
STORM WARNINGS
The National Weather Service displays storm warnings at the following approximate locations:
Ambrose Light (40°27'4"-73°49'9")
For a complete list of storm warning stations, see large scale charts.

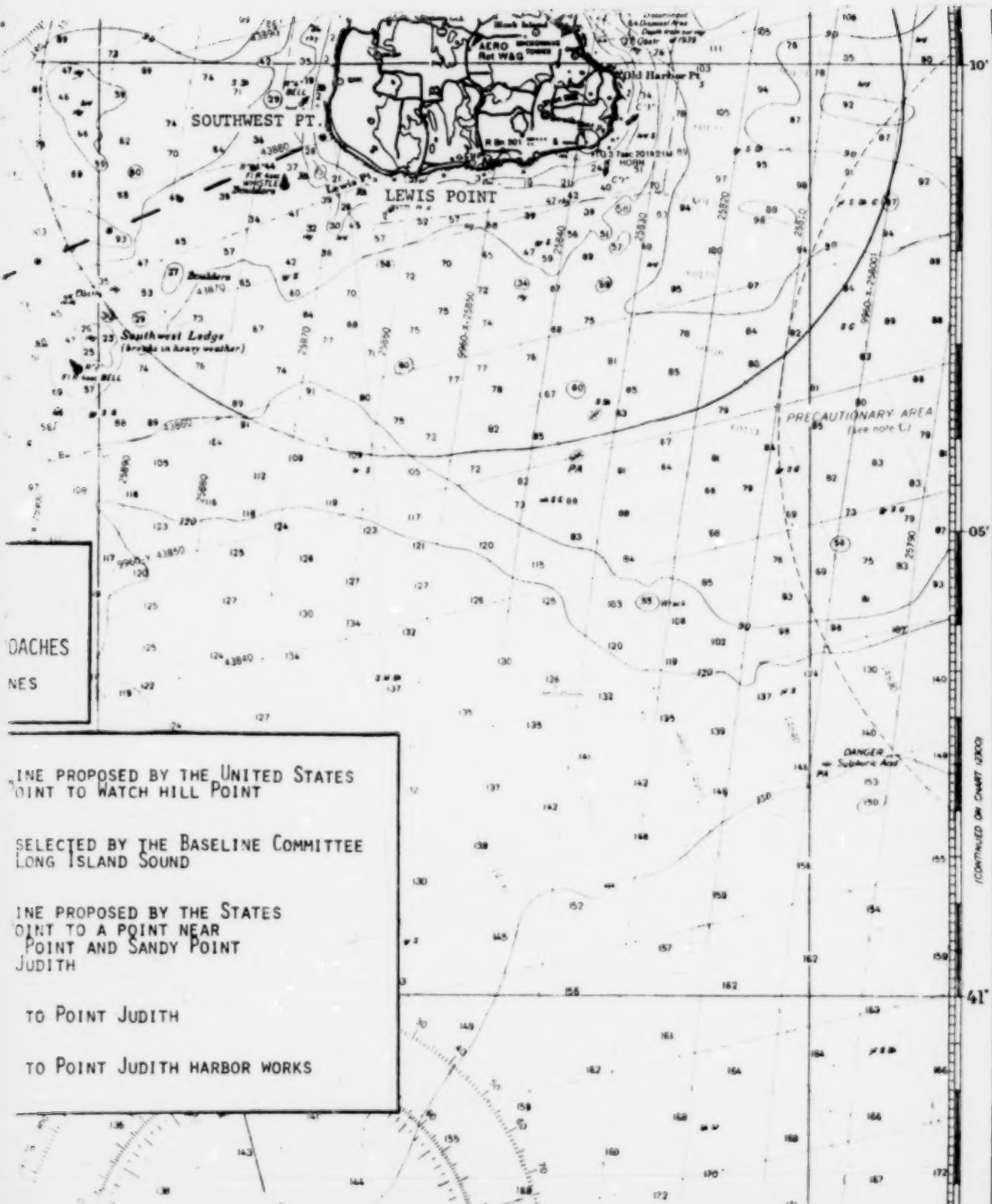
AIDS TO NAVIGATION
Consult U.S. Coast Guard Light List for supplemental information concerning aids to navigation.

WARNING
The prudent mariner will not rely solely on any single aid to navigation, particularly on floating aids. See U.S. Coast Guard Light List and U.S. Coast Pilot for details.

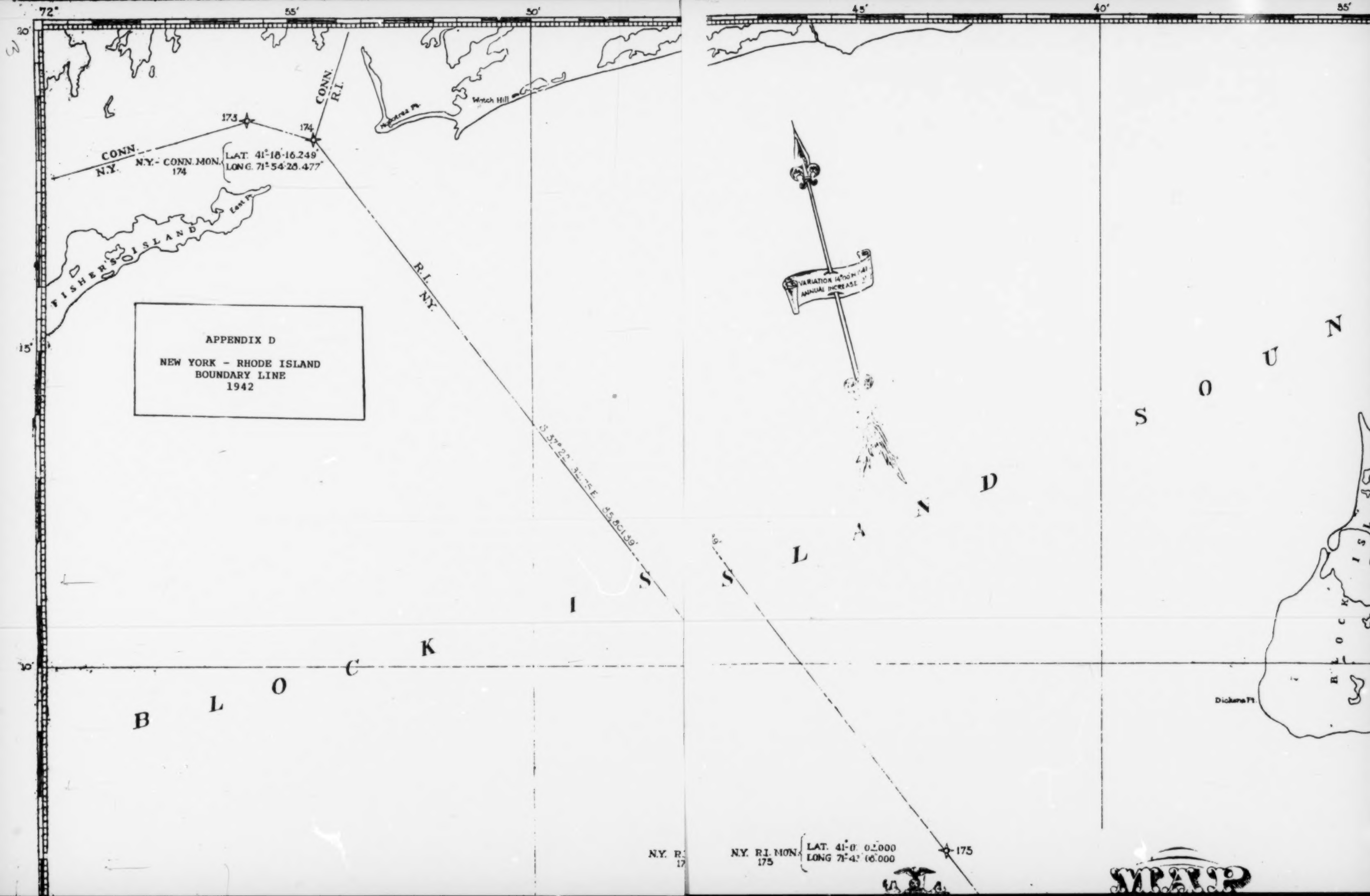
NONDANGEROUS WRECKS
Nondangerous wrecks shown on charts 12326 and 4 have been omitted from this chart. The limits are 12326 and 12214 are shown in purple.







APPENDIX D



55'

71 39'

20'

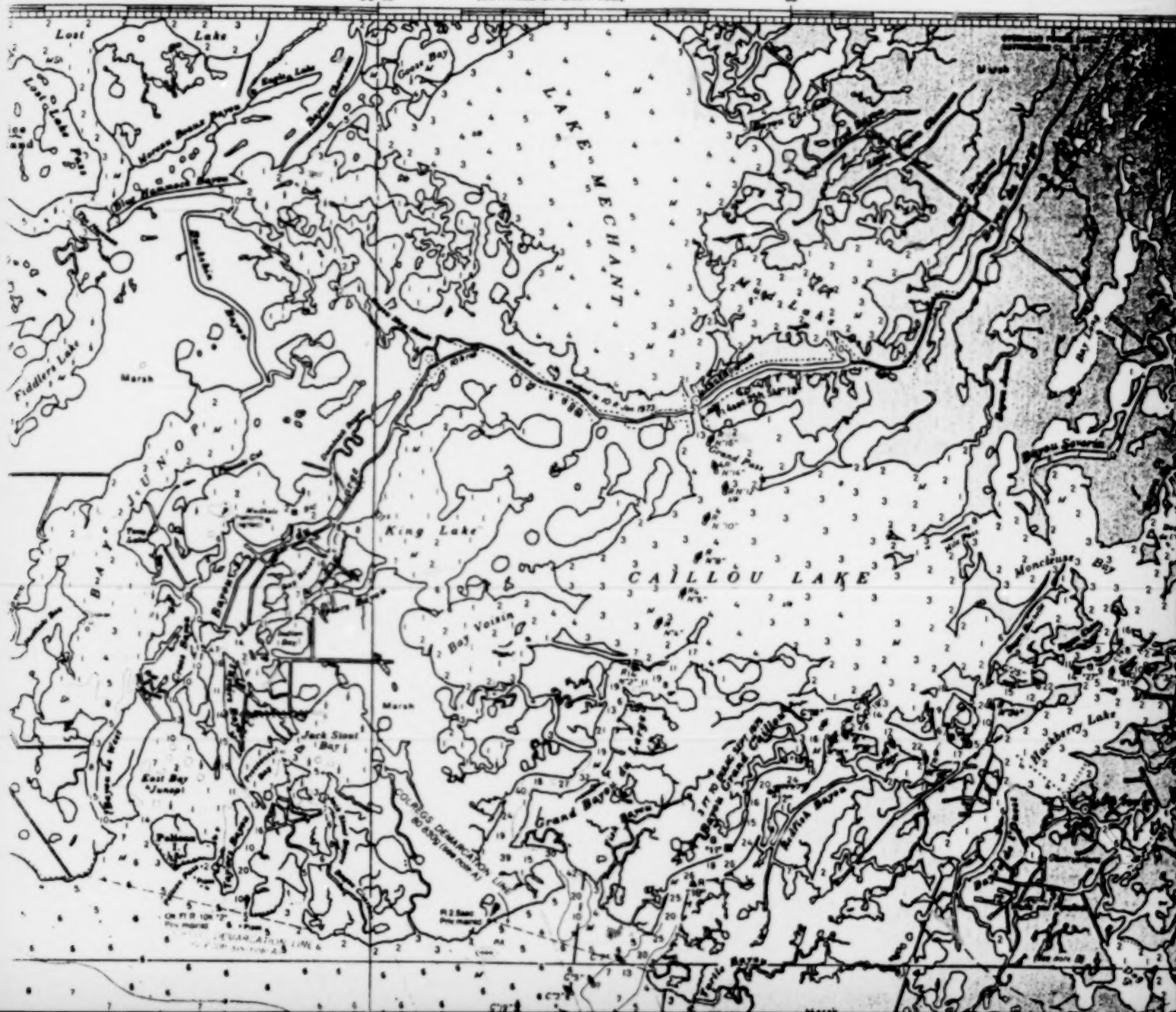
U
N
D

15'



APPENDIX E

55



B

L

O

C

N.Y.



STATE OF NEW YORK

Department of State

FILED MARCH 26-1942

TRACED FROM A MAP

Published at Washington D. C. Jan. 1941

By THE U.S. COAST AND GEODESIC SURVEY
L. O. Gilbert, Director

72'

55'

80'

N.Y. R.I. MON
175LAT. 41° 0' 02.000
LONG 71° 4' 16.000

175



MAP

OF THE

BOUNDARY LINE

BETWEEN THE STATES OF

New York and Rhode Island

COMMISSIONERS

FOR THE STATES OF

RHODE ISLAND

NEW YORK

Arthur W. Brandt

Acting Chief Engineer of the State Department of Public Works

Harold C. Osterlag
Chairman, Joint Legislative Commission
on Interstate Co-operation

Lithgow Osborne
Commissioner of Conservation

Edward H. Rathbun
Boundary Line Adjuster

Nautical Miles

Yards

1000 0 2000

40'

RR

RY LINE

STATES OF

Rhode Island



ONERS

TES OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

Daniel J. Ryan, Director
Department of Public Works

Edward H. Rathbun
Edward H. Rathbun, Chairman
Boundary Line Adjustment Commission

George L. Crooker
George L. Crooker, Chairman
Commission on Interstate Cooperation

000 10000

J.A. Gehlins, del.

35'

71° 50'

